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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK.

BY
SAMUEL JONES AND JAMES C. SPENCER,
REPORTERS OF THE COURT.

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VOL. LII.

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Rec. March 23, 1886

JUDGES
OF THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK,
DURING THE TIME OF THIS VOLUME OF REPORTS.

JOHN SEDGWICK,
CHIEF JUDGE.*

HOOPER C. VAN VORST,
JOHN J. FREEDMAN,
CHARLES H. TRUAX,
RICHARD O'GORMAN,
GEORGE L. INGRAHAM.

JUDGES.

• * Elected for second full term of fourteen years, beginning January 1, 1886.

ERRATA.

On page 106, in first line of head-note, words "as to right to sell," should be stricken out.

On page 404, 13th line, before word "value," word "yearly " should be inserted.

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CASES ARGUED AND DETERMINED
BY THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK.

GEORGE E. HYATT, AS RECEIVER, &C., RESPONDENT, v.
JACOB SWIVEL, IMPEADED WITH JOSEPHINE
LIBBY, THE NEW YORK CAFE CO. (LIMITED),
APPELLANTS.

Corporation—Certificate of stock—compelling issue of while one therefor is outstanding.—Summons—order for publication.—Evidence—affidavit taken without state.—Judgment—order vacating—when appealable.

When an action is brought against the transferrer and transferee of stock in a corporation, and also the corporation, to have the transfer adjudged void, and to have the corporation deliver to the plaintiff its certificate for a like amount of stock, and the transferee is not brought into court, so that the judgment in the action will be inoperative as against him, the court has no authority to render a judgment against the corporation adjudging it to issue to the plaintiff a new certificate, while the other remains outstanding.

An order for publication of summons, based on an affidavit in which the only fact alleged is, that the defendant against whom the publication is desired is a non-resident, and for that reason personal service within the state cannot be made, is void.

A certificate as to the official character and genuineness of signature of the officer taking an affidavit in another state, is insufficient to entitle the affidavit to be received as legal evidence of the facts therein stated, if it does not certify both that the officer was duly authorized to take affidavits in that state, and that the certifying officer is well acquainted

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with the handwriting of the officer taking the affidavit and believes the signature to the verification to be genuine. An affidavit of service of summons taken in another state, having attached to it such defective certificate of proof is no proof of service.

In case of judgment in action above indicated, entered *ex parte* on default of corporation defendant, adjudging it to issue a certificate to plaintiff, it is the power and duty of the court, on motion of such defendant, it being shown that the transferee had not been brought into court, to vacate it; and an order at special term, denying such motion, is appealable to the general term.

Before SEDGWICK, Ch. J., FREEDMAN and INGRAHAM, JJ.

Decided March 30, 1885.

Appeal by the defendant Swivel from a judgment entered after trial before a judge at special term without a jury. Also, appeal by the New York Café Co. (limited), from an order of the special term, refusing to resettle or modify the judgment entered in this action, and directing the said judgment to be entered *nunc pro tunc*, as of June 10, 1884.

The action was to declare fraudulent and void an assignment and transfer of one hundred and forty shares of the stock of the defendant, the New York Café Co. (limited), made by defendant Jacob Swivel, to defendant, Josephine Libby, and to require the defendant company to issue and deliver to plaintiff its certificates for a like amount of stock in the name of the defendant Jacob Swivel, plaintiff being a receiver in supplementary proceedings.

The complaint contained the following allegation: "That no personal claim or judgment is made or prayed for herein against defendant, the New York Café Co. (limited), but it is made a defendant in order that a final judgment in favor of plaintiff may be made effectual by requiring said defendant to issue new certificates of stock to the plaintiff in the name of Jacob Swivel, and to enjoin said company *pendente lite*, from making or permitting any transfer upon its books of said stock so standing in the name of defendant, Josephine Libby, as aforesaid;" and prayed for relief as against the company, "that said

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company be required to issue and deliver to plaintiff its certificates for a like amount of stock, in the name of said Jacob Swivel ; that until the final judgment herein, the defendant, the New York Café Co. (limited), be enjoined and restrained from making or permitting any transfer on its books of said stock ; that a receiver be appointed to take possession of same ; and for such other or further relief as may be just."

The other facts appear in the opinion.

M. J. Dolphin, attorney, and *De Witt C. Brown*, of counsel for appellants, on the questions discussed by the court, argued :—I. The affidavit for the order of publication is insufficient. It merely states that Mrs. Libby is a non-resident of the state of New York, and a resident of the state of Mississippi. It does not prove to the court, that she cannot be served here. So, too, the proof furnished of personal service without the state is fatally defective. There is the affidavit of Rosser, whose name is not given : "D. E. Rosser, being duly sworn," and signed at the end, "D. E. Rosser." It purports to be sworn to before John L. Gill, clerk of circuit, and *ex officio* notary public. T. R. McGuire certifies that he is the clerk of the chancery court and *ex officio* of the board of supervisors, and that John L. Gill was, at the time of signing said certificate, clerk of the circuit court, and *ex officio* notary public. But McGuire does not certify that he knows the handwriting of Gill ; nor that, under the laws of Mississippi, Gill had any authority to administer oaths. Nor is the official character of McGuire vouched for in any manner.

II. The Café Company was made a defendant, but did not defend the action. The complaint served with the summons notified the company, "that no personal claim or judgment is made or prayed for herein against the defendant, The New York Cafe Company (limited), but it is made a defendant in order that a final judgment in favor of plaintiff may be made effectual by requiring said

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defendant to issue new certificates of stock to the plaintiff, &c." By requiring the company to issue new certificates, "how?" The company is alleged to be a New York corporation, and it is a misdemeanor to issue a certificate representing existing, outstanding stock, except upon the surrender of the old certificates, and the defendant had the right to suppose, as it was advised by its counsel, that the court could only require it to issue a new certificate, according to law. To issue a new certificate, except upon the surrender of the old, was to increase its capital stock, which it could not do (*Mich. Bk. v. N. Y. & N. H. R.R. Co.*, 13 *N. Y.* 599; *Lathrop v. Kneeland*, 46 *Barb.* 432). And if it did this, and the new certificate got into the hands of a *bona fide* holder, the company is liable (*It*). And yet the complaint informed the company that no personal claim was made, and no personal judgment would be taken. But the judgment entered makes the company liable to redeem this over-issue from any *bona fide* holder of the certificate.

III. The argument urged, that the court acquired no jurisdiction of Mrs. Libby to render a judgment invalidating her title to the 140 shares, seems overwhelming when applied to the motion made by the company.

A. Walker Otis, attorney, and of counsel for respondent, on the questions discussed by the court, argued :—I. The court at special term has no power on motion to alter a judgment in a material part (*Prentiss v. Machado*, 2 *Rob.* 660; *Stevens v. Veriane*, 2 *Lans.* 90; *McLean v. Stewart*, 14 *Hun.* 472; *Rockwell v. Carpenter*, 25 *Id.* 529; *Kelly v. McMahon*, 19 *Week. Dig.* 223).

II. The defendant, the New York Café Co. (limited), having been regularly served with the summons and complaint, and having refused to answer, and thereby suffered default, is bound by the judgment, and cannot secure by motion what it should have obtained, if at all, by a trial (*Bullard v. Sherwood*, 85 *N. Y.* 253; *Fleischman v. Stern*, 90 *Id.* 110).

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III. The motion made below was a motion to resettle, and the order denying the same is not appealable.

BY THE COURT.—INGRAHAM, J.—The defendant, Swivel, alone answered, and the issues raised by that answer were tried at special term. The New York Café Co. did not answer.

An order was obtained directing the service of the summons by publication on the defendant Libby, she being a non-resident, and personal service of the summons was made on her under the provisions of that order in the state of Mississippi. The defendant Libby did not appear in the action.

The court below found that the assignment by the defendant Swivel to defendant Libby of the certificates for one hundred and forty shares of the capital stock of the defendant, Café Co., was fraudulent and void as to the plaintiff, and directed judgment that the said corporation issue and deliver to a receiver a certificate for the said one hundred and forty shares of the said stock. From this judgment defendant Swivel appealed.

An examination of the evidence shows that there was sufficient to sustain the findings of the court, and so far as the judgment affects the defendant Swivel, there was no error committed that would justify a reversal of the judgment.

It follows, therefore, that on the appeal of the defendant Swivel, the judgment appealed from must be affirmed, with costs.

Judgment was entered without notice to the defendant, Café Company, and without the direction of the court or the judge who tried the case. The judgment directed the said company to issue and deliver to a receiver appointed in this action, certificates for the one hundred and forty shares of the capital stock of the said corporation. The defendant, the Café Company, on affidavit, moved to resettle the judgment by requiring in effect that the surrender of the old certificates before the defendant corporation

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should be required to issue new certificates for said stock. The court, on hearing the motion, directed the same judgment to be entered *nunc pro tunc* as of June 10, 1884, and from this order the defendant, Café Company, appealed.

The stock in question had been transferred to the defendant Libby by Swivel, and stood in her name on the books of the corporation. That transfer was good as to all the world except creditors, but as to them it was voidable only on it appearing that it was in fraud of their rights. Swivel was the owner of the stock, and on his transfer of it to Libby, she became vested with an absolute title to the stock, subject to the right of the creditors to attack the transfer as fraudulent; and her right to the stock could not be taken away except in an action in which she was a party and was before the court.

Until the delivery of the certificates of stock by her with a proper transfer or assignment, the company had no right to transfer the stock, represented by said certificates, or issue new certificates in their place except upon the judgment of a court of competent jurisdiction, in an action in which she was a party. In no way could she be divested of her ownership by the corporation (*Kent v. Quicksilver Mining Co.*, 78 N. Y. 159).

Defendant Libby was a party to this action, and plaintiff attempted to serve her with a summons under an order directing the service of the summons by publication. The affidavit on which this order directing the publication was granted, was not, however, sufficient to give the judge who granted it, jurisdiction.

The only fact alleged in the affidavit was that the defendant Libby was a non-resident, and for that reason personal service within the state of the summons on her could not be made.

The court of appeals, in the case of *Carleton v. Carleton* (85 N. Y. 313), held under section 135 of the Code of Procedure, that an affidavit that the defendant was a non-resident of the state, without proof where the defendant

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actually was at the time, was not sufficient to give the court jurisdiction to make the order; that some evidence must be shown from which the court could find that the defendant was not at the time within the state, and personal service of the summons therein could not, with due diligence, be made, and that the mere fact of non-residence was not sufficient (See also *Kennedy v. N. Y. Life Ins. Co.*, 32 *Hun*, 35; *Greenbaum v. Dwyer*, 66 *How.* 266, under § 439, *Code Civ. Pro.*).

But if the order had been valid, there was no legal evidence that the summons had been served on the defendant Libby under its provisions. Plaintiff presented what purported to be an affidavit signed by D. E. Rosser, and which purported to be subscribed and sworn to before John L. Gill, clerk of circuit and *ex officio* notary public, and to that was attached a certificate headed: "State of Mississippi, Bolavar County. I, T. R. McGuire, clerk of the chancery court in and for said county, and *ex officio* clerk of the board of supervisors in and for said county, do hereby certify that John L. Gill, whose signature is attached to the foregoing certificate, is and was at the time of the signing of the said certificate, clerk of the circuit court and *ex officio* notary public in and for said county, duly qualified to act as such."

Section 844 of the Code of Civil Procedure provides, that to entitle an affidavit made out of the state, to be received in an action, it must be accompanied with a like certificate as to the official character of the officer taking the affidavit and the genuineness of his signature, as are required to entitle a deed acknowledged before him to be recorded in this state.

The certificate required to entitle a deed acknowledged before him in this state is regulated by section 1 of chapter 557 of the laws of 1867. The certificate in question does not comply with the provisions of that section. It does not certify that the officer was duly authorized to take the affidavit, or to take and certify the acknowledgment of deeds to be recorded in that state. Nor does it certify

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that the clerk signing the certificate is well acquainted with the handwriting of such officer, and believes the signature to the verification of the affidavit to be genuine. The paper is, therefore, not an affidavit, and is no proof of the fact therein stated (*Harris v. Durkee*, 50 *Super. Ct.* 202).

It appearing that the order of publication was void, and that there was no proof of service on the defendant Libby, I am of opinion that no judgment should have been entered adjudging that the transfer of the stock of the Café Co. to defendant Libby was void, and directing the defendant, Café Co., to issue a new certificate therefor, and that so much of the order as directs the entry of the judgment *nunc pro tunc*, as of June 10, 1884, should be reversed, and the judgment vacated with costs and disbursements to the New York Café Co. (limited).

SEDGWICK, Ch. J., and FREEDMAN, J., concurred.

MARGARET MOORE, ET AL., AS EX'RS, &C., RESPONDENTS, v. WILLIAM LEONARD AND ROSE LEONARD, IMPEADED, ET AL., APPELLANTS.

Usury—finding against not disturbed.—Notice to produce—what compliance with.

In an action to foreclose two mortgages, the defense was usury. Plaintiffs relied on two certificates as to the validity of the mortgage, and as to there being no defense to them. Defendants called a witness who testified to hearing a conversation between one of defendants and the plaintiffs' testator (the mortgagee), tending to establish the usury—relied on, and also called two others who testified to admissions by the mortgagee tending in the same direction. The court below found in favor of plaintiff. *Held*, that the finding should not be disturbed.

A notice to produce a certain account-book containing entries of money paid by M. to L. and by L. to M., was given. A book was produced which complied with the notice. *Held*, a compliance with the notice, although a witness who testified to having seen this book at a certain

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interview also testified, that at the same interview he had seen another book.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided March 30, 1885.

Appeal from a judgment entered upon the findings of a judge on a trial at special term, without a jury.

The action was to foreclose two mortgages, and the defense was usury. The facts appear in the opinion.

E. Seymour, attorney, and of counsel for appellants, argued among other things :—I. The court erred in questioning Moore's identity, not in issue, and had no right, *contra* unimpeached and uncontradicted testimony, to presume the man wasn't Moore, or disbelieve witnesses who had no interest whatever in the result of this suit, or inducements to commit perjury (25 *N. Y.* 361 ; 1 *Cow.* 109).

II. Neither of the certificates can be considered, under the surroundings of this case, an estoppel. Both parties knew of the usury, and any statement to the contrary was a falsehood, a device to cover usury ; but there is no evidence that Leonard knew their nature or contents. The only question of fact before the court, was whether each mortgage was void for usury (2 *R. S. ch.* 4, tit. 3 ; 1 ed. p. 772, § 5 ; 1 *Cow. Trea.* 3 ed. 284, 286). It is insisted, no estoppel can be set up between immediate parties to avoid the force of the statute against usury, and no so-called equitable estoppel exists in this case (4 *Barb.* 501 ; 22 *Hun.* 264 ; 1 *Smith Ldg. Cas.* 1847, 511 ; 62 *N. Y.* 96 ; 69 *Ib.* 113 ; 73 *Ib.* 597 ; 82 *Ib.* 129).

Kelly & Macrae, attorneys, and *Wm. F. Macrae*, of counsel for respondents, argued :—Usury is a defense which must not only be strictly proven, but must be affirmatively and positively established (*Tyler Usury*, 468). It is not enough that the relation of the witnesses to each other, and the circumstances sworn to by them, render it highly probable that the transaction was usurious ;

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the usury must be proved, and not left to conjecture. Nor will it avail the defendant that the case makes out usury, if it is not the case made by the answer. The corrupt agreement must be distinctly set up and proved as alleged (*New Jersey Co. v. Turner*, 1 *McCarter*, 326; *Western T. & Coal Co. v. Kilderhouse*, 87 *N. Y.* 434; *Dagal v. Simmons*, 23 *Ib.* 491).

II. The testimony of defendants in the case at bar, makes no pretense whatsoever, of proving any actual agreement between the parties. Admissions of a party are to be taken with great and extreme caution. The admissions here are uncertain, indefinite and wholly unreliable, and prove nothing (*Booth v. Swezey*, 8 *N. Y.* 276).

III. It is contended that the court below erred in excluding the contents of a book. There was so much doubt about the identity or existence of the book, or what its contents were, that the court below was justified in using his discretion to exclude the supposed contents. It would be giving great license to a witness to permit him to testify to the contents of a book merely "glanced at," when he is confessedly unable to state with any precision or accuracy what the book, if it ever existed, was, or what it contained, or whether it had any reference to the mortgages in suit. The question as to the sufficiency of proof of loss, so as to admit parol evidence of the contents, is entirely in the discretion of the trial court. The case must be quite without proof to authorize an appellate court to find error (*Graham v. Chrystal*, 1 *Abb. N. S.* 121; *McCullogh v. Hoffman*, 73 *N. Y.* 615; *Latourette v. Clark*, 51 *Ib.* 641; *Bridges v. Hyatt*, 2 *Abb.* 449).

IV. Parol evidence, to establish the contents of a writing, must be clear, certain and positive, "such as leaves no reasonable doubt" (*Nickols v. Kingdom Ore Co.*, 56 *N. Y.* 618; *Edwards v. Noyes*, 65 *Ib.* 125; *Lozer v. Burt*, 4 *Den.* 426; *Graham v. Chrystal*, 2 *Keyes*, 21; *Taylor v. Riggs*, 1 *Peters*, 591). The notice to produce served in this action "requires plaintiffs to produce a

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certain account-book containing entries of moneys paid by William Moore, deceased, to William Leonard, and by William Leonard to William Moore," and such a book was produced and put in evidence. Whether then, Abbott had ever seen another book, or knew enough about its contents to speak with any accuracy, was very questionable, and the court was quite right in excluding the witness' confessedly uncertain recollection of its supposed contents.

BY THE COURT.—INGRAHAM, J.—The court below found that the bonds and mortgages described in the complaint were given for a valuable consideration received by the defendant, William Leonard, on or before the execution thereof ; that there was no usury upon or for the making of such bonds and mortgages, or either of them.

After a careful examination of the evidence given on the trial, we think there was sufficient to sustain that finding. The plaintiffs proved the bonds and mortgages, and also an instrument in writing dated February 16, 1875, signed by the defendant William Leonard, and duly acknowledged before a notary public. That instrument certified that there was justly due and unpaid on said respective mortgages, viz.: one dated August 11, 1873, and the other dated September 19, 1873 (as described in the complaint), the full amount of the principal secured thereby, together with interest from the respective dates of said mortgages, and that he (Leonard) had no offsets or legal or equitable defense against the same. Plaintiffs also proved an agreement dated October 30, 1876, signed, executed and acknowledged by William Leonard and Rose Leonard, his wife, and which recites that the said mortgages, being the same mortgages described in the foregoing certificate or instrument, are, and each of them is a good and valid lien for the amounts respectively upon the said premises, and there were no claims or offsets of any nature or kind whatsoever against the respective amounts secured thereby, or any part thereof or the interest due, or to grow due thereon.

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It will be noticed that both of these instruments are executed long after the execution of the mortgages in question, and not as part of any alleged usurious transaction. They were both formally executed and acknowledged, and while they did not estop the defendant from denying the truth of the facts stated in them, they are strong evidence as against him.

The defendant to overcome this proof called a witness, who testified that some time in the second week of July, 1873, he was present at a conversation between the plaintiff's testator and the defendant Leonard; that Leonard asked Moore to loan him \$6,000 to finish the building on the mortgaged premises; that Moore in reply said, "You know the mortgage of \$7,000 is on the property already; I will cancel that \$7,000 mortgage, and I will give you \$5,000 cash if you will give me a mortgage for \$13,000." Leonard said, "I will agree." That is all the witness knew of that transaction; was not present when the mortgage was given; did not know, and it does not appear, that this agreement was carried out, or that the mortgages in suit were given in pursuance of that agreement.

There was a mortgage for \$7,000, which was dated August 8, 1867, and that mortgage, being part of the consideration for the \$13,000 mortgage described in the complaint, was owned by Mr. Moore at the time, and was satisfied and discharged by him on August 12, 1873. It might well be that the interest due on that \$7,000 mortgage at the time of the execution of the \$13,000 mortgage was more than sufficient to make up the difference between the amount of the \$13,000 and the amount of the additional \$5,000 that the witness McDermott said Moore was, by the agreement he heard, to pay to Leonard, if that agreement was afterward carried out.

The same witness again testifies that he heard another conversation about two months later, and this time substantially the same thing is said about another

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mortgage, Leonard wishing more money to finish the building. Moore this time says, "You give me a mortgage for \$4,000, and I will give you \$3,000 cash." Leonard says, "That is too heavy," but finally agrees.

The interview happened eleven years before the trial, and was heard by the witness who had no interest in the property or in the parties, and who appears to have no business in the place except to listen to the conversation between Leonard and Moore.

The trial court, having the witness before it, and having heard his evidence, refused to believe his testimony.

The defendant also called two witnesses to swear to admissions made by Moore to Leonard, in which Moore is made to admit that Leonard gave him a mortgage for \$13,000, and received only \$12,000, and another mortgage for \$4,000 and received only \$3,000.

In order to sustain his defense, the defendant was bound to set up in the answer the usurious contract, specifying its terms and the particular facts relied upon to bring it within the prohibition of the statute, and to prove them substantially as alleged (*Western Transportation Coal Co. v. Kilderhouse*, 87 N. Y. 430).

The trial judge has found that the defendant has failed to prove the usurious agreement alleged in his answer, and we think that finding is supported by the evidence, and should not be disturbed.

No error was committed in excluding the contents of the book that Mr. Abbott says he saw on his visit to Moore. No notice to produce that particular book was given to plaintiffs' attorney. A notice was served on plaintiffs' attorney to produce a certain account-book containing entries of money paid by Moore to Leonard, and by Leonard to Moore, and a book was produced on the trial which complied with this notice.

It appears that at the same interview, Mr. Abbott had seen another book, but the notice to produce related to but one book, and the production of the book containing the accounts between the parties, complied with the pro-

Appellant's points.

visions of the notice. It did not appear that the other book seen by Mr. Abbott contained accounts between Leonard and Moore, or related in any way to the transaction in question, and it further appeared that the witness was allowed, on cross-examination, to testify substantially to the contents of the book.

The other exceptions to the evidence have been examined, but none of them require specific notice. We think none of them well taken.

We think that the judgment appealed from should be affirmed, with costs.

SEDGWICK, Ch. J., and O'GORMAN, J., concurred.

JULIUS STERN, APPELLANT, v. HERMAN KNAPP,
RESPONDENT.

Practice.—motion for leave to amend pleading.

Where the notice of motion merely asked "for an order permitting the plaintiff to amend his complaint herein;" and no copy of the proposed amended complaint was served with the motion papers,—*Held*, that for want of such service the motion was properly denied.*

Before SEDGWICK, Ch. J., and INGRAHAM, J.

Decided March 30, 1885.

Appeal from an order denying motion by plaintiff for leave to amend his complaint.

The application was based on an affidavit, the pleadings in the case, and a notice of motion, which merely asked "for an order permitting the plaintiff to amend his complaint herein."

Louis J. Grant, attorney, and *Arthur Furber*, of counsel, for appellant.

**Query*, whether a notice of motion setting forth the particulars in which it is desired to amend would not be sufficient?

Opinion of the Court, by INGRAHAM, J.

Herman Knapp, attorney in person, *Martin & Smith*, and *George A. Strong*, of counsel for respondent, on the point decided, argued:—The motion for leave to amend was properly denied, because plaintiff failed to serve any copy of his proposed new complaint. His motion was so broad that to have granted it would not only have permitted the insertion of a new count, setting up a new and different cause of action, but also an amendment of the present count. The notice of motion is simply “for an order permitting the plaintiff to amend his complaint herein.” He should have annexed to his notice of motion a copy of the proposed new complaint, and his failure to do so was of itself sufficient ground for denying his motion (*Marquisee v. Brigham*, 12 *How. Pr.* 399; *Nightingale v. Cont. L. Ins. Co.*, 2 *Law Bull.* 15; *Super. Ct.*). How could the special term exercise its discretion, when the plaintiff did not present to it the complaint which he was asking leave to serve? In effect, he sought an order from the court, giving him unrestrained liberty to amend, as he might see fit.

BY THE COURT.—INGRAHAM, J.—Without determining whether an order refusing to allow a party to amend the complaint is appealable, we think the order appealed from should be affirmed.

The application to amend was made upon the affidavit of the plaintiff and the pleadings in the action. No amended complaint as proposed by the plaintiff was served with the papers on which the motion was made, nor presented to the court on the argument. The court below was compelled to spell out, from the affidavit, the nature and extent of the proposed amendment.

In applications of this kind, addressed to the discretion of the court, it is the duty of the court to determine whether the application is made in good faith, and to refuse to allow a pleading to be amended if it appears that the pleading, as amended, would be clearly frivolous, or in violation of any of the settled rules of pleading. This

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examination can not be made, unless the court has before it the pleading as it is proposed to be amended ; and as the plaintiff did not, in this case, present a complaint amended as he proposed, the court below was right in refusing to entertain the application.

For the reason above stated, and without examining the other objections raised by the respondent, we think the order appealed from should be affirmed, with ten dollars costs and disbursements.

SEDGWICK, Ch. J., concurred.

ANDREW S. TOCKERSON, RESPONDENT, v. MYRON H. CHAPIN, APPELLANT.

Action for damages for false representations on a sale—Character of representations—what requisites to recovery.—Evidence—Worthlessness of corporate stock, how shown.

The worthlessness of stock is proved by a decree of sequestration of the property of the corporation, and when so proved, opinions of witnesses on the subject are inadmissible.

In an action for damages for false representations on a sale, the representations must relate to some substantial circumstance going to the inducement or essence of the bargain, material to the subject of the negotiation and constituting the very basis of the contract. They must also relate to facts (not to opinions) bearing on the subject of the contract—not to those collateral and incidental thereto. They must also have a vital bearing and influence on the mind of the party in inducing him to enter into the contract, and must be such as to affect the value of the thing purchased.

In the case of a sale of shares of stock in a corporation, the plaintiff knew that the property of the company consisted of patent-rights of an invention for cutting goods, and that the plan of the company was to dispose of royalties, sell shop-rights and machines, and that it had no other source of profit. A prospectus given to plaintiff referred to a certain loom, which it was stated did not belong to the company, but could be purchased from the manufacturers and would cost but little more than the ordinary one. The plaintiff was a machinist, and had made a personal examination of the machine for which the company owned the

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patent, and was satisfied with its performance. *Held*, that representations that the company had orders for 500 looms at \$150 each (there being no representation that any profit could accrue to the company therefrom); that five cutting machines at \$5,000 each had been ordered by certain named firms; and that a member of one of those firms was a large stockholder in the company; there being no evidence that their falsity, if they were false, injuriously affected the value of the stock, did not possess the above requisites, and no cause of action for damages could arise out of their falsity.

Before SEDGWICK, Ch. J., and O'GORMAN, J.

Decided March 30, 1885.

Appeal from a judgment in favor of the plaintiff and against the defendant for \$686.50, entered on the verdict of a jury.

The facts sufficiently appear in the opinion.

F. B. Van Vleck, attorney, and *B. F. Blair*, of counsel for appellant, cited:—On the measure of damages, *Hubbell v. Meigs*, 50 *N. Y.* 480–491, and argued that under the rule there laid down, the court improperly excluded evidence offered on behalf of the defendant as to the value of the invention, of the patents, and of the stock at the time of the sale of the stock, and subsequent thereto, and as to the amount of the capital stock. On the proposition that respondent having elected to affirm the contract, retain the stock and sue for damages, he could recover only “such damages as he could prove,” *Morgan v. Skidmore*, 3 *Abb. N. C.* 106; arguing, among other things, “It is no answer to say that it is difficult, if not impossible, to prove the actual value of the stock of a corporation in the absence of a market value. Plaintiff might have avoided the difficulty by rescinding the contract, returning the stock, and suing for the price paid, and that remedy would have been perfectly adequate. But he chose the other course and must accept its disadvantages.”

Platt & Bowers, attorneys, and *John M. Bowers*, of counsel for respondent, argued:—The issues that the

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plaintiff has to maintain in an action of this kind, as was well stated in the charge of the court below, are as follows: (1.) Did the defendant make the representations that he is alleged to have made? (2.) Did the plaintiff buy the stock in reliance on those representations? (3.) Were the representations false and fraudulent? (4.) Was the plaintiff damaged by those representations? (*Hubbell v. Meigs*, 50 *N. Y.* 480; *Miller v. Barber*, 66 *Ib.* 558; *Cazeaux v. Mali*, 25 *Barb.* 578; approved, *Bruff v. Mali*, 36 *N. Y.* 206; *Yates v. Alden*, 41 *Barb.* 172; *Wakeman v. Dalley*, 44 *Ib.* 498; affirmed, 51 *N. Y.* 27; *Painton v. Northern Central Ry.*, 83 *Ib.* 7; *Mason v. Rapelyea*, 66 *Barb.* 180). As to the effect of the decree of the order of sequestration, see *Thompson Liability of Stockholders*, 388; *Brower v. Harbeck*, 9 *N. Y.* 589; *Ferry v. Bank of N. Y.*, 15 *How. Pr.* 445; §§ 1784 and 1793, Code).

BY THE COURT.—O'GORMAN, J.—This is an action to recover \$500 as damages, being the price of twenty shares of the stock of a corporation called the “Double Weaving & Cutting Company,” sold by defendant to the plaintiff.

This sale, the plaintiff claims to have been effected by means of false and fraudulent representations of defendant as to the value of said stock, which was at the time of the purchase, and at all times since then, wholly worthless. The price paid by the plaintiff was \$25 for each share. The par value was \$100 a share. The sale was made and the money paid on September 14, 1881.

The plaintiff's evidence as to the making by the defendant of the representations as charged in the complaint, was contradicted by the defendant. Enough of testimony, however, was given on behalf of the plaintiff, if the jury believed it, to sustain his contention on that subject.

The learned trial judge charged the jury, at the request of appellant's counsel, that the measure of damages was the difference between the price that plaintiff paid for the stock, and its actual value at or about the time when he

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ascertained that the representations were untrue ; and the jury gave damages for the full amount paid for the stock and interest, finding in effect that the stock was worthless. The evidence introduced by the plaintiff on that subject, was the record of a judgment obtained on July 18, 1883, in favor of the defendant in this action against the said company, for \$794.42. On this judgment, execution was issued against the property of the corporation, and returned unsatisfied, followed by a decree of sequestration upon the property of the corporation, and the appointment of a receiver on August 10, 1883. The learned trial judge held that the worthlessness of the stock was proved by this decree, and refused to admit as evidence of value the opinions of witnesses on the subject. These rulings in themselves are correct. The decree of sequestration of the property of a corporation, under sections 1784 and 1793 of the Code, depended on record evidence of its complete inability to pay its debts, and in effect closed the career of the corporation, and its corporate life then came to an end (*Eddy v. Co-operative, &c. Association*, 3 *Civ. Proc.* 442).

Another question still remains to be considered, which was raised, although somewhat vaguely, by one of the defendant's requests to charge. Assuming that the stock was worthless, as claimed by the plaintiff, what sufficient evidence is there that it would have had any value if the facts were as represented by the defendant, or that the non-existence of these facts in any degree, caused the stock to be worthless? In other words, what evidence is there that plaintiff suffered any damage as the natural and legitimate consequence of the representations made by the defendant?

To maintain an action for obtaining money on fraudulent representations, it must be proved by the plaintiff that the person charged made the representations ; that they were false to his knowledge when made ; that the representations related to some substantial circumstance going to the inducement or essence of the bargain—mate-

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rial to the subject of the negotiation, and constituting the very basis of the contract. The representation must relate to facts, not to opinions, and to facts bearing on the subject of the contract, not do those merely collateral and incidental thereto, and the representation must have had a vital bearing and influence on the mind of the party, in inducing him to enter into the contract (*Arthur v. Griswold*, 55 *N. Y.* 400 ; *Smith v. Countryman*, 30 *Id.* 655).

The plaintiff here does not seek to rescind the contract of sale, nor does he offer to return the shares of stock purchased by him from the defendant. He affirms the contract, and claims to recover the damages resulting from the alleged fraud. In such a case, the recovery is restricted to such damages as he can prove (*Morgan v. Skidmore*, 3 *Abb. N. C.* 92). This proof, in my opinion, the plaintiff in the case at bar failed to supply. He was a machinist, and, before purchasing the stock in question, he made a personal examination of the cutting machine, for which the "Double Weaving & Cutting Company" owned patents, and he was satisfied with its performance. He received from the defendant a printed prospectus of the company, setting forth that it owned only these patents, and the cutting-machine tools, &c., at their place of business in South Fifth avenue. In the prospectus, reference was made to a loom, which, it was there stated, did not belong to the company, but could be purchased from the manufacturer in Rhode Island, and would cost but little more than the ordinary loom.

One of the representations alleged to have been made by the defendant, inducing plaintiff to purchase the stock, was this : That the company had orders for five hundred looms at \$150 each. The evidence to sustain this charge is insufficient. But if this representation was true, it was immaterial, because the company did not manufacture these looms, and did not hold out any prospect of any profit from the manufacture of these looms by others, and

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it is not alleged that defendant represented that any such profit could accrue to the company therefrom.

The plaintiff testified that he understood the property owned by the company was the patent-right of the invention for cutting goods, and that the plan of the company was to dispose of royalties, sell shop-rights and machines, and that it had no other source of profits. If this representation was made, it could not have been the inducing cause of the plaintiff's purchase of stock in the company, and there is no evidence that the stock would have been more valuable, if the representation was true, or less valuable because it was false.

The next representations alleged to have been made by defendant, and to be false, were that five cutting machines, at \$5,000 each, had been ordered by certain firms named by the defendant, and that a member of one of these firms was a large stockholder in the company.

Assuming that these representations were made as alleged, and were untrue, there is no evidence that, by reason of their falsity, the value of the stock was injuriously affected. They were not material to the substance of the contract, but related to facts only collateral and incidental to it.

The burden of proving damage was on the plaintiff, and he failed to supply such proof. It was not enough to leave the question to be determined without evidence, and only by the conjecture or surmise of the jury.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

SEDGWICK, Ch. J., concurred.

Statement of the Case.

KENNETH E. MACLENNAN, RESPONDENT, v. THE
LONG ISLAND RAILROAD COMPANY, APPEL-
LANT.

Railroad company—intending passenger ; rights and duties of ; contributory negligence.—Carrier ; negligence and duties of.—Evidence ; mental operation, as to loss of business and permanency of injury, as bearing on.

Where, to prove a cause of action or a defense, it is necessary to show that a witness acted upon a certain supposition, evidence to that effect is material and relevant, and he is a competent witness to testify that he so acted ; but it must also be shown by the evidence that the appearance justified the witness in having the supposition, and that the party against whom he testified was responsible for that appearance.

Accordingly, where the plaintiff, on coming out of the passenger depot where he had bought his ticket, on to the platform, which was joined to and on the same level with the platform to the freight station, which was some distance from the passenger station, and which latter platform (i. e., the one in front of the freight station) appeared to be used in connection with said freight station, saw a train of cars with an engine attached, heading in his direction, standing on the track some distance away.

Held, that he had a right to suppose that the train would be brought up to the passenger station and then stop to take on passengers ; and that his waiting, in the passenger station, for the train to come up and stop, was not negligence contributing to the injury received in the dark by falling over an obstruction, to wit ; a box in his way on the freight platform, while proceeding to take the train at the place where it stood, as soon as he was notified by the ticket agent that the train would start from there.

Held further, that his running, while so proceeding, instead of walking, was not, under the evidence, contributory negligence, as matter of law.

Held further, as resulting from above holdings, in an action for injuries so received, that requests to charge (1st) "that it was the duty of the plaintiff to take notice of the time of the departure of the train and to board it at a reasonable time before departure," and that (2d) "if the plaintiff remained near a light for the purpose of reading a book, and then, at the last moment, attempted to board the train when the time was so short that he could not do so in a prudent and careful manner, he was guilty of negligence," and that (3d) "the company has a right to make up its train and let it stand in front of any part of the station connected with the station as a starting point, and that it was the duty of the passenger to inquire whether it would stop in front of the station or not,"—were properly refused.

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Further held, that if the defendant used the freight platform for a passenger platform, so that passengers were obliged to go from the latter to the former, and especially if the defendant's employees invited the plaintiff to go on the line of approach which he took, the court could not say, as matter of law, that the defendant had a right to leave the box in the way of the plaintiff; and there being evidence on which the jury might have found in both these questions in plaintiff's favor, and the box having been there for some time, it was properly left to the jury to determine whether or not the defendant was guilty of negligence in leaving the box where it was under the conditions under which it was so left. Where it is sought to prove damages for loss of business, evidence of particular facts, where there is no effort to make the testimony the ground of any claim for damages for specific loss therefrom, is admissible to show the general character of the business lost.

The plaintiff, being a physician, may be asked whether, from his experience as a physician, there is any probability of his suffering thereafter, from a particular one of the injuries received, damages which are claimed in the action. An answer: "No probability, only a possibility," is favorable to the defendant.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 6, 1885.

Appeal by defendant from judgment entered upon a verdict for plaintiff.

The action was for damages from negligence of defendant's servants.

The facts sufficiently appear in the opinion.

Hinsdale & Sprague, attorneys, and *E. B. Hinsdale*, of counsel for appellant, on the questions considered in the opinion, argued.—I. The motions for non-suit should have been granted for failure to prove negligence on the part of defendant. The defendant was not bound to have the train drawn up to a point opposite the door of the depot. Such a proposition is unworthy of serious consideration. Nor was it bound to put up a notice advising passengers of the spot from which the train would start. It is the duty of passengers to inform themselves of the ordinary incidents of railway traveling, and to inform themselves of the company's regulations for running its trains (*Mitchell v. Chicago & G. T. R'wy. Co.*, 12 *Am. & E. R.*

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R. Cas. 163 ; *Little Rock & Forth Smith R. R. Co. v. Miles*, 13 *Id.* 10). Defendant was undoubtedly bound to provide a reasonably safe and proper means of ingress and egress between the station and the train, so that a person exercising ordinary care could safely pass from one to the other (*Loftus v. Union Ferry Co.*, 84 *N. Y.* 460). This duty was performed.

The box was not an obstruction, and its being there was no violation of defendant's duty towards its passengers. It is established by the testimony, and shown by the map, that the box occupied less than two feet of the outer side of the platform (away from the train), the platform being at that point six feet two inches wide. There was, therefore, a clear and unobstructed passage way from the station door to the train of nearly five feet (being at some points much wider). In *Loftus v. Union Ferry Co.* (*supra*), the rule is thus laid down : "The defendant was bound to provide suitable and safe accommodation for the landing of passengers. . . . But the rule does not impose the duty of so providing for the safety of passengers that they shall encounter no possible danger and meet with no casualty" (See also *McMahon v. N. Y. El. R. R. Co.*, 50 *Super. Ct.* 507 ; *Dougan v. Champlain Trans. Co.*, 56 *N. Y.* 1). Any inference of negligence on the part of the company in permitting this box to remain upon the platform is negatived by the fact that the box had been there a long time, hundreds of passengers had got on and off at the same spot, and no injury had been caused or inconvenience occasioned. This principle has been frequently laid down by the courts (*Loftus v. Union Ferry Co.*, *supra* ; *Dougan v. Champlain Trans. Co.*, *supra* ; *Crocheron v. N. S. Staten Island Ferry Co.*, 56 *N. Y.* 656 ; *Cleveland v. N. J. St'mbt. Co.*, 68 *Id.* 306, 313).

II. The motion for non-suit should have been granted, because there was a failure to prove that the deceased was free from negligence, and also because the evidence showed that he was in fact guilty of such negligence. It was incumbent upon the plaintiff to give some affirmative

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evidence of his exercise of care. And where the proof is not inconsistent with the theory of contributory negligence, a non-suit should be ordered (*Hale v. Smith*, 78 *N. Y.* 480 ; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 *Ib.* 330 ; *Baulec v. N. Y. & H. R. R. Co.*, 59 *Ib.* 356). It was undoubtedly the duty of the plaintiff to use his eyes, and look out for obstacles in the pathway. There is a limit to the degree of necessary caution ; but still some care and foresight must be shown (*Delaware, Lack. & W. R. R. Co. v. Napheys*, 1 *Am. & E. R. R. Cas.* 52 ; and cases *supra*). The case is absolutely barren of any such evidence. The plaintiff says, of course, in just so many words, that there was not light enough to enable him to see the box, but he nowhere says that he looked for any obstruction.

The plaintiff had no right to assume that the train would start from a particular part of the platform (See cases, *supra*). Having time enough to have made inquiries and boarded this train in a proper and careful manner, it was grossly careless of him to deliberately place himself in such a position that, at the last moment, in his eagerness to catch this, the last train, he would be naturally impelled to start up suddenly and begin to run along a comparatively narrow platform. This negligence had a direct connection with the injury (*Little Rock & Fort Smith R. R. Co. v. Miles*, 13 *A. & E. R. R. Cas.* 10).

The running along the platform was, in itself, negligent. If it be said that he was compelled to run, we answer : *a.* It does not appear there was any such necessity. It may well be, for all there is of evidence to the contrary, that the train would have waited for him to have boarded it in a proper manner. *b.* Such a necessity was of his own creating and not in any way chargeable to the defendant. *c.* If the plaintiff saw that he did not have time to go to the train in a careful manner, then it was his plain duty to have refrained from going at all ; holding the defendant responsible for any violation of

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duty of which it was guilty ; but he had no right to do a negligent act which his physical situation enabled him to avoid (*Cincinnati, &c., R. R. Co. v. Peters*, 6 *Am. & Eng. R. R. Cas.* 126 ; *Watkins v. Great Western R.R. Co.*, 37 *L. T. N. S.* 193).

III. The motion for new trial should have been granted (*Smith v. Aetna Ins. Co.*, 49 *N. Y.* 211 ; *Houghkirk v. D. & H. C. Co.*, 92 *Ib.* 219).

IV. The court below erred in ruling upon questions of evidence. The exception to the ruling as to plaintiff's supposition was well taken. It was wholly immaterial whether the plaintiff supposed the train was to draw up in front of the station door or not. It was his duty, under the cases above cited, to inform himself of the actual situation, and act according to the facts. The evidence being utterly incompetent from any point of view, it was not necessary to state the ground of objection (*Burns v. City of Schenectady*, 24 *Hun*, 10 ; *Mulqueen v. Duffy*, 6 *Ib.* 299 ; *Porter v. Parks*, 2 *Ib.* 654 ; *West v. Lynch*, 7 *Daly*, 245). The objections to the evidence as to his giving up a particular patient, and as to patients calling to see him who were denied admission, were wholly irrelevant ; especially in view of the fact, that no attempt was made to show that he lost any money in losing these patients. Yet it may well be that a large portion of the amount awarded in the verdict was based upon this vague and improper testimony. The question as to probability of future suffering from the injury to the nose was clearly improper. Any testimony in response to such a question would be, and in this case was, entirely too vague and speculative to be a proper foundation for the assessment of damages (*Strohm v. N. Y. L. E. & W. R. R. Co.*, 96 *N. Y.* 305).

V. The court below was in error in refusing defendant's requests to charge. The first request embodied a sound proposition of law ; was not covered by the charge, and had direct bearing upon the issue (*Mitchell v. Chicago & G. T. R. Co.*, 12 *Am. & E. R. R. Cas.* 163 ; *Little*

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Rock & Ft. Smith R. Co. v. Miles, 13 *Am. & E. R.R. Cas.* 10). The second request was equally proper, pertinent and necessary. The refusal of the court to charge as thirdly requested, was also error for which the judgment should be reversed.

Oliver W. West, attorney, and of counsel for respondent, among other things, argued :—I. It was the primary duty of the defendant to start its trains from in front of the station ; but it being its custom not to do so, but to start them from a point sixty or seventy feet eastward therefrom, and to pass the station without stopping, it was its duty to give timely notice to its passengers, either orally or by written or printed notice, of the place of starting, and its failure to do so was negligence (*Hurlbert v. N. Y. C. R. R. Co.*, 40 *N. Y.* 145). The only notice given the plaintiff was an oral one just as the train was about to start.

II. It was the duty of the defendant to keep its platform, which was the only passage way for passengers to use in getting on board its trains, free from obstructions ; and its admitted failure in this respect was negligence (*Clussman v. L. I. R. R. Co.*, 9 *Hun*, 618 ; *Hurlbert v. N. Y. C. R. R. Co.*, *supra*). The box in question ought not to have been kept in the way of passengers, even in the day-time, but should have been kept in the freight house, or, at all events, near it and at the east end of the station building, and thus out of the way of passengers ; and its continued presence where it was kept, especially in the night-time, was gross if not criminal negligence.

III. The plaintiff was not guilty of any contributory negligence. This, as a matter of fact, the jury must have found, otherwise their verdict would have been in favor of the defendant. The general term will not, therefore, disturb the verdict on this question of fact (*Murphy v. Lippe*, 35 *Super. Ct.* 542. The only facts proved, which, the defendant insists, constituted contributory negligence were : 1. The omission of the plaintiff, on or after buying

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his ticket, to inquire where the train would start from. 2. His standing by the depot door reading and waiting for the train to come up and stop, instead of early inquiring where the train would start from and going immediately on board at his leisure. 3. His running or "trotting" towards the train after the conductor shouted, "All aboard !" 4. His omission, in these circumstances, to see and avoid the box.

The time-table of the defendant was notice to the plaintiff that the train would start from the station, and he was therefore excused from inquiry if it would start elsewhere. This being so, it was immaterial how he occupied his time, whether in reading or otherwise, while waiting for the train, so long as he violated no rule of the company, and so long as he obeyed any instructions given him by the defendant. No such disobedience is asserted. On the contrary, it is undisputed that he at once obeyed the directions of defendant's employees, and while hurrying in compliance with those directions, neither his obedience thereto nor his failure in the darkness to see and avoid the danger from the obstruction which the defendant had no right to place in his only pathway, and which rendered the pathway unsafe instead of safe, as he had a right to assume it to be, can on any principle be held to be contributory negligence. And even if the box was rightfully where it was, and the plaintiff, ignorant of its existence, had stumbled over it while thus obeying the untimely commands of the defendant, he would not have been chargeable with contributory negligence.

BY THE COURT.—SEDGWICK, Ch. J.—The plaintiff, after buying a ticket in a passenger station of the defendant's railroad, stood outside of the station near its door, upon the platform in front of the station. To the east of the passenger station was a freight station, and in front of it was a platform ; this platform appeared to be used in connection with the freight station. The passenger platform and the freight platform joined each other, and were on

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the same level. The plaintiff did not live in the place, and had come there to attend a patient as a physician. When he went out of the door of the passenger station, where he bought his ticket, he saw that there was a train of cars with locomotive engine heading in his direction, standing on the track some distance to the east of the passenger platform. He was asked on the trial, whether at the time, he supposed the train would move up and stop opposite the passenger depot. He answered, "Yes." There was an objection to the question; the objection being overruled, the defendant excepted. The question was certainly relevant and material. The plaintiff, after he noticed the train standing away from the passenger platform, did not go to it and get upon it, but stood until he was notified that the train was about to start at once on its trip, from the place where it was, without stopping at the passenger platform to take passengers. He was then obliged to hurry and run, instead of taking an ordinary gait. To prove his cause of action, he had to prove that he was without negligence that contributed to the accident. He was bound, in one aspect of the case, to justify to the jury his remaining on the passenger platform, instead of proceeding to the train. The fact that caused him to stand, was that he supposed the train would come to the passenger platform to take passengers. If he did not so suppose, he was without reason for standing, no matter how much the appearance of things might have justified his making the supposition if he had considered their effect. He was a competent witness to the existence of the fact that he supposed as he testified. Of course, he was also bound to show by the testimony in the case, that the appearances, for which the defendants were responsible, justified him in having the supposition. The judge charged, "that the plaintiff had a right to suppose that the train would be brought up before the station," meaning, no doubt, the passenger station. My opinion is, that there was evidence tending to show that the plaintiff was right in this respect, and no evidence tending the other

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way. On the facts, the plaintiff had a right to rely on the natural and direct impression that would be made by the situation of affairs. He was not bound to know that the defendants had a sufficient reason for not stopping at a passenger station. It might, perhaps, be that on the issue of defendant's negligence, a jury would say that the fact that if they stopped for a minute or two at the passenger station, the locomotive and its head-light would frighten horses that might be upon a near highway, was a sufficient excuse for not stopping. But on the question of contributory negligence, the plaintiff was justified in relying upon the significance of such things as appeared to him. Now, the meaning of a passenger platform in front of a passenger station, is that there is the place where passengers await the coming and departure of trains. It is common knowledge, that before a departure of a train, it often waits away from the passenger platform for a certain time, and then, ringing the bell, moves up to the passenger platform for the passengers. If the plaintiff had perceived that the train was standing in front of a freight station and platform, that would have been another reason for which defendants would have been responsible for the plaintiff supposing that he had to await at the place for passengers the coming of the train.

The plaintiff stood reading a book by a light that shone from the passenger station. After standing a few minutes, he received notice from the ticket agent that the train was about to depart at once from the place where it stood to the east. He looked at the train, and observed signals, that defendant's witnesses proved were intended for the plaintiff, and that indicated that the train was to leave at once. He started on a walk, then went to a run, on a direct line for the train. He tripped over a box in the way, and was injured severely. In my judgment, the questions of negligence suggested by these facts were properly submitted for determination to a jury, and could not have been considered by the court as concerning mat-

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ters of law. If the defendants used the freight platform for a passenger platform, when passengers were to go from the latter to the former, and especially in this case, where the jury might find that the defendant's conductor and engineer invited, in substance, the plaintiff to go on the line of approach that he took, a court could not say that, as matter of law, the defendant had a right to leave a box upon the platform in the way of the plaintiff. The box had been there for some time. It was argued that it was an act of negligence on plaintiff's part to run. As to this, there was a disputable question of fact, of whether the plaintiff running instead of walking was not induced by the signals that were given by defendant's servants, indicating that they wished him to hurry. It was also for the jury to say whether a person of ordinary prudence would think of the possibility or probability of an obstruction being upon the platform, or would have a right to suppose that there was no obstruction in such a place, and it could not be held to be law that it was negligent for a person to run upon a level, unobstructed platform.

Against objection of defendant, plaintiff was allowed to testify that he had been attending, at the place from which he came to the station, a case of childbirth, and that the hurt he received prevented his attending it after that; that he had other patients, whom he could not attend for the same reason; that several patients called upon him for professional advice, whom he could not see for the same reason. There was no effort to make this testimony the ground of any claim for damages for the specific loss of the cases referred to. It was admissible to show the general character of his business which he lost, as determined by the description of the particulars testified to.

The defendant objected to a question to the plaintiff, "State whether, from your experience as a physician, there is any probability of your suffering in any way hereafter from this injury to your nose?" The question was competent, as referring to one consideration perti-

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nent to the certainty of future consequences according to reasonable probability, but the answer was favorable to the defendant, as it was that there was no probability, and only a possibility. This tended to limit damages favorably to defendant.

The defendant's counsel requested the court to charge, that it was the duty of the plaintiff to take notice of the time of the departure of the train, and it was his duty to board the train at a reasonable time before the time of its departure. This was not correct, for it impliedly declared that, as matter of law, it would be negligence for a passenger, in ignorance of the time of departure, to await the usual signals given by those in charge of the train, that the train was about to depart.

Another request was that if the plaintiff remained near a light for the purpose of reading a book, and then at the last moment attempted to board the train when the time was so short that he could not do so in a prudent and careful manner, he was guilty of negligence. This request referred to a contingency, that according to the witnesses for defendant and plaintiff alike, did not exist within the case. It was the fact, that the conductor and engineer in charge of the train were waiting for the plaintiff, and the plaintiff would have safely boarded the train if he had not fallen, and the train took him after the accident. The accident did not happen because of the train starting.

Another request was that the company had a right to make up its train and let it stand in front of any part of the station connected with the station as a starting place, and that it was the duty of the passenger to inquire whether it would stop in front of the station or not. There are several considerations which justified the refusal of the request. It is sufficient to point out that the jury could find on the facts, that the plaintiff did learn that the train was about to start from the place where it had been standing, and would have safely reached it by running, if the box had not tripped him.

Appellant's points.

I think that the judgment should be affirmed, with costs.

O'GORMAN and INGRAHAM, JJ., concurred.

EDWARD SMITH, APPELLANT, v. WILLIAM
BISPHAM, ET AL., RESPONDENTS.

Negligence case.—Employer and Employee.—Providing safer methods.

In turning over by hand, under orders of defendant's foreman, a portion of a moulding apparatus, used in a foundry, being the cope, the men assigned to that work had lifted it on its edge, and were of sufficient number and strength to hold it, so far as its weight was concerned, in its other movements; a workman, in order to clear it from the crane which was used to lift the cope, but was then out of order, moved the cope with a crow-bar along on its edge some inches, when, on a further application of the bar, he disturbed its balance, thus suddenly throwing additional weight upon the men who had been safely holding it, causing them to let it fall in consequence of the weight coming so suddenly on them. It fell on the plaintiff, who had been ordered to repair the crane, and who, at the time when the cope fell over, happened to be between the cope and the crane. The plaintiff sustained severe injuries.

Held, 1st, that the complaint was properly dismissed; 2d, that the case did not require a consideration of a duty to use a certainly safer method than one that is sufficiently safe in itself.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 6, 1885.

Appeal by plaintiff from judgment dismissing complaint, entered on a direction of a judge at a jury trial term.

The action was for damages from negligence of defendants.

The facts sufficiently appear in the opinion.

Roger Foster, attorney and counsel, for appellant.

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Paddock & Cannon, attorneys, and *William H. Arnoux* and *Franklin A. Paddock*, of counsel for respondents.

BY THE COURT.—SEDGWICK, Ch. J.—The plaintiff was a workman in an iron foundry, in which the defendants did business. He was in their employment; he had been directed to mend some part of a crane in the building, and had gone to the crane and was about to begin work upon it. This crane had been used to lift and move a flask, which was a heavy box of wood and iron. The movable top or cover of this box is called a cope. The box was intended for moulding iron, but at the time was empty. There was evidence that the habit was to lift and move the cope apart from the rest of the box by the crane. The crane being out of order, one of defendant's foremen ordered the workmen near to turn over by hand either the whole of the flask or the cope by itself. The testimony is indefinite on this point. They proceeded to do so; the result was such, that, according to the testimony, the men were holding up the cope, with its lower edge resting on the ground, when the plaintiff was between it and the crane. The purpose of the men was to let the cope fall on the ground, so that it would clear the crane. As its edge at first rested on the ground, it could not fall back without striking the crane, and in order to push the edge further from the crane, one of the men, by means of a crow-bar, pried it along. This man, after prying it some six or seven inches, applied the crow-bar again, and, as the witness testified, the act disturbed the balance of the cope, and suddenly threw additional weight upon the men, who had been safely holding it, and they allowed it to fall, because the weight came so suddenly upon them. The evidence showed that they were competent to hold it, so far as its weight was concerned, in either of the movements of the flask or cope, for in fact they had managed it safely. The plaintiff's counsel on the argument placed defendants' negligence upon a direction of their foreman

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to move the flask or cope by hand, instead of by the crane. The defendants did not have at the time the crane to use, as it was out of order, and the facts do not require a consideration of a duty to use a certainly safer method, than one that is sufficiently safe in itself. The obligation of the defendants in the most favorable view for plaintiff, was to use ordinary precaution in selecting a safe method. There was no proof, and in the nature of things there could not be, that in allowing the cope or flask to be turned over by hand, there was a duty of entertaining the possibility of some one being in the way when the cope fell over ; and if no one was in the way, it is clear that the falling of the cope would endanger no one. As to the defendants' obligation to foresee that some one might be in the way, the plaintiff's being at the place where he was hurt was a fortuitous occurrence. And, indeed, it is not correct to say that he was where he was by order of defendants, through their foreman. That order would have been obeyed if the plaintiff had taken a position where the cope could not have fallen upon him. But the falling that did happen was in fact occasioned not because a machine was not holding up the cope, but because a sudden prying of it disturbed its balance. It is impossible to see on the present testimony that this prying was negligently done, or if it were, that the defendants would be liable for an act that presented an ordinary risk of an employment into which the plaintiff had voluntarily entered.

I am of opinion that the judgment should be affirmed, with costs.

O'GORMAN and INGRAHAM, JJ., concurred.

Appellants' points.

OSCAR L. RICHARDS, ET AL., APPELLANTS, v. DAVID FOX, ET AL., RESPONDENTS.

False representations—Time material.—Conforming pleading to proof, motion for, when not granted.

The cause was tried, and turned in the court below, upon questions as to the points of time when defendants received from plaintiffs the sum of money sued for, which plaintiffs alleged defendants had obtained from them on the false representations that a similar one was due them from the United States government as and for a drawback, and that they would pay to plaintiffs the amount of the drawback when the same should be paid to them by the United States,—and also upon the question as to when defendants received the drawback from the United States. The evidence showed that defendants made the representations and received the money from plaintiffs, and also received the drawback on the same day; but failed to show which was received first. *Held*, that the complaint was properly dismissed.

A motion to conform pleadings to proof will not be granted when its effect will be to so amend the complaint that it would appear that there was no cause of action.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 6, 1885.

Appeal by plaintiff, from judgment dismissing the complaint entered upon a direction of a judge at a trial term, with a jury.

Kaufmann & Sanders, attorneys, and *Lewis Sanders*, of counsel for appellants, made the point on the question of time :—That the plaintiffs had proved that their office was kept open until six o'clock, except on Saturdays, when it closes between four and five; that they did a general banking business, did not stop drawing checks until they closed, and that the check given the defendants was the last check drawn on July 14, 1883, thus raising a presumption that their check was given after three o'clock, at which hour the sub-treasury closes. They further argued that, independent of this question of time, the plaintiff was entitled to recover; and referring to the

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facts shown by the evidence that on July 14, 1883, the defendant, David Fox, had a debenture in his possession, which he had received on, and which was payable on July 6, provided the duties arising on the importation in respect whereof the debenture was given were paid, and that the duties were paid June 9, 1883, and also to the other evidence, argued, that there was an intent to defraud, or the defendant David Fox would have surrendered the debenture to the plaintiffs when he received their check for the duties, if he had not then cashed it.

Fraud and damage combined gave a good cause of action. The action is for fraud and deceit, not false representations. When the defendants made the representations, upon which they obtained the plaintiff's check, they had in their possession the means of defrauding the latter, and they put that means into effectual operation on the same day, whether it was by converting the debenture certificate, or by the money previously refunded. It is entirely clear that plaintiffs never would have advanced the money had defendants disclosed the fact of their possession of the debenture certificate or check, requiring present payment or refund of the duties. It is equally as clear that, without intent to defraud, defendants never would have asked plaintiffs for their check. A. "He stated that he wanted the money from us, stating that he did not know how long it might be before he could recover the money from the government, and, therefore, he insisted upon our paying the money first." The fraud consists in the conversion of plaintiffs' check, obtained by deceit. The facts proved are within the allegation of the complaint, and no amendment was necessary. The evidence was admitted without objection, and no amendment was necessary (*Tyng v. Commercial Warehouse Co.*, 58 N. Y. 313; ch. 431, *Laws* 1876; § 723, *Code*; *Reeder v. Sayre*, 70 N. Y. 190).

If any amendment was necessary, the court should have granted it, as the defendants could not have been

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taken by surprise by proof of their own acts. Surprise was not suggested nor possible.

Richard S. Newcomb, attorney, and *Albert Cardozo*, of counsel for respondents, argued :—I. There was proof that the defendants received the money from both the government and the plaintiffs on the same day, but there was a total absence of any evidence as to which payment was prior in point of time. As the plaintiffs held the burden of proof to show that Mr. Fox's statement was false, it was incumbent on them to show that at the time the money was received by the defendants from the plaintiffs, the defendant had also received the amount from the government. This they utterly failed to do, and in favor of innocence, which the law always presumes, the inference would be that the money was received from the plaintiff first.

II. To make any case against the defendants, the hour when the payments were made was necessary to be proved by the plaintiffs. In such cases fractions of a day will be considered (*Haden v. Buddensick*, 39 *How. Pr.* 246).

III. It was not error for the court to refuse the motion to conform the complaint to the proof. (1.) There was no proof of fraud, and therefore nothing to conform the complaint to the proof. (2.) When a plaintiff brings the action in such form as to entitle him to an order of arrest and an execution against the body of the defendants, he should see to it that he has proof which will entitle him to recover in that form. The statute (*Code*, § 549, sub. 4), expressly provides that when the action is brought for the alleged fraud the plaintiff cannot recover unless he proves the fraud.

BY THE COURT.—SEDGWICK, Ch. J.—The complaint alleged that the defendants, “with intent to deceive and defraud the plaintiffs by inducing them to furnish defendant's firm with the sum of \$424.10, represented to plaintiffs that the firm of Charles Fox Sons & Co., had paid the sum of \$424.10 to the United States government, in pay-

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ment of certain duties, &c. ; that defendants were entitled to receive back said sum from the United States, less one per centum of the amount thereof ; that the defendants had made a proper claim for the refund of said sum, but that the whole amount thereof was still due them and unpaid, and that if plaintiffs would reimburse defendants the aforesaid amount of duties expended by them, they, defendants, would return and pay to plaintiffs the amount which would be refunded to defendants, whenever the same should be paid back to them ;" that relying upon the truth of such representations, the plaintiffs paid the money as requested ; " that at the time, the defendants, &c., knew such representations to be false, and knew that no sum whatever was then due or owing to defendants from the United States government, on any claim made by defendants for refund of duties paid on the entry aforesaid, and knew that the amount of refund on the claim made by defendants had been paid to defendants by the United States prior to the time of said representations.

On the trial, the case turned upon an issue, made by an allegation of the answer, that at the time of the representation, the defendants had not received from the United States the amount of the drawback or any part of it.

The plaintiffs proved by a clerk of the customs, that the defendants received a check for the drawback on July 14, which was the day on which the representations were made, but he could not tell on what hour of the day the defendants received the check. The check was paid in the sub-treasury. He said he thought the sub-treasury closed at three o'clock in the afternoon. A witness for plaintiffs, who delivered the money to defendants upon their representation, testified that he had no positive remembrance of the time in the day that the affair happened, but he believed it was about the middle of the day. After leaving the stand, he was again called as a witness, and produced the check-book of plaintiffs and testified that from that book it appeared that the check drawn

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to defendants was the last one in the book of that day, that the office "closes at six o'clock, we do not stop drawing checks until we close; we do a general banking business;" that he had no definite remembrance of the time, except what he then had from examining the check-book, and that then he could not tell at what hour that check was drawn.

The judge below was right in dismissing the complaint, on the ground that the plaintiffshad not proved that the defendants had received from the United States the amount of the drawback, at the time of the representation. It was not proved that the drawback had been paid before the middle of the day, when the witness for plaintiffsthought the matter occurred. There were no circumstances in the case which would have justified a jury in inferring that the check was in fact drawn near six o'clock on a particular day, because the firm generally kept drawing checks to the close of business, and kept the office open until 6 o'clock. This matter was safely tested by the witness saying that, after all, he could not tell at what hour the check was drawn. The motion to conform the pleadings to the proof could not have been granted, for it was substantially a motion that the complaint be so amended that it would appear that there was no cause of action. It did not incontrovertibly appear that at the time of the representations, the defendants intended not to repay the plaintiffs.

Judgment affirmed, with costs.

O'GORMAN and INGRAHAM, JJ., concurred.

Statement of the Case.

IDA HORBOSTEL, APPELLANT, v. FRANCIS S. KINNEY AND THE KINNEY TOBACCO CO., RESPONDENTS.

Patent—use of—royalties—Construction of agreement as to.—Trade-mark.—Sweet Caporal.

Plaintiff and defendant, Francis S. Kinney, entered into an agreement, whereby plaintiff granted said defendant the exclusive use of a certain patented process for treating and curing tobacco during the continuance of the patent, and defendant agreed to pay one cent a pound for every pound of tobacco treated by him by said process; and whereby it was further agreed that should defendant fail to use the process in the treatment of 250,000 pounds of tobacco annually, the license for the exclusive use should cease; but defendant was still to have a license, not exclusive, to use the process in the manufacture of cigarettes and smoking tobacco. At the time of making this agreement, defendant was selling a cigarette, to which he had given the name of "Caporal." He proposed to call cigarettes made according to said process "Sweet Caporal," to which plaintiff assented, and he did make cigarettes according to that process and sell them under that title up to a certain period (up to which all royalties were paid), after which, neither he nor his transferee, the other defendant, used the process, but they continued to sell cigarettes under the name of "Sweet Caporal."

Held, that defendant, Francis S. Kinney, was not, under the agreement, bound to continue the use of the process, but was only bound to pay a royalty on such cigarettes as he should manufacture under the process; and that defendants, not having manufactured under that process since the period up to which all royalties had been paid, plaintiff had no claim against them for royalties.

Held further, that as the word "Caporal" had been applied to cigarettes by defendant, Francis S. Kinney, before he had ever used the process in question, and as the word "Sweet" prefixed to it was only descriptive of quality, the plaintiff could have no right to the exclusive use of those words, either separately or in conjunction, as a trade-mark applicable to cigarettes; and consequently, as there was no evidence of any agreement, as to the use of the name of "Sweet Caporal," specially on cigarettes treated under the process in question, or that plaintiff or her assignees should have any exclusive right to use such a name as a trade-mark, plaintiff was not entitled to an injunction restraining defendants from using that name as applied to cigarettes.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 6, 1885.

Opinion of the Court, by O'GORMAN, J.

Appeal from a judgment entered on dismissal of plaintiff's complaint.

The facts appear in the opinion.

Johnston & Tilton, attorneys, and *Albert Mathews*, of counsel for appellant.

Charles B. Meyer, attorney, and *John S. Davenport*, of counsel for respondents.

BY THE COURT.—O'GORMAN, J.—The action was tried at special term, without a jury.

The relief asked for by plaintiff was, (1) That defendants be enjoined from the use of the name "Sweet Caporal" on cigarettes; and (2) That they pay annually a royalty of one cent a pound on two hundred and fifty thousand pounds of tobacco.

The material facts are these: Charles Hornbostel, claiming to have invented a new process for treating and curing tobacco, assigned to his wife, the plaintiff, his right to a patent for the same, which had been applied for by him, and letters patent were issued to her therefor on May 1, 1879. In December, 1878, plaintiff had entered into an agreement in writing with defendant, Francis S. Kinney, whereby she granted to him the exclusive use of the said process during the continuance of the patent, and also agreed to provide him with materials necessary to enable him to make use of the patent. Kinney, on his side, agreed to pay her one cent a pound for every pound of tobacco treated by him by said process; and should he fail to use the process in treatment of at least two hundred and fifty thousand pounds of tobacco annually, the license for the exclusive use of the process was to cease; but Kinney was still to have a license,—not exclusive,—to use the process in the manufacture of cigarettes and smoking tobacco. Subsequently, and, as it would appear, for better security to defendants, on March 16, 1879, the plaintiff conveyed to said Kinney the exclusive right to use the process in the United States.

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Charles Hornbostel had been in communication with Kinney on the subject of this process as early as October, 1878, and was making experiments therein. Kinney, at the time, was in the tobacco business, and selling a cigarette to which he had given the name of "Caporal." He proposed to call cigarettes made according to the Hornbostel process "Sweet Caporal," to which Charles Hornbostel assented, and cigarettes were made and sold by Kinney according to this process, under that title, up to December, 1879, and royalties were paid to plaintiff thereon.

In December, 1879, Kinney transferred his business to the "Kinney Tobacco Company," the other defendant, and about that time Kinney complained to Charles Hornbostel that the process did not work well, and was no good, and offered to return the assignment of the patent which plaintiff had given him, which offer Charles Hornbostel declined.

There is no evidence that, after that time, Kinney or the defendant company used the Hornbostel process, but they did sell cigarettes under the name of "Sweet Caporal."

On these facts, there appears no cause of action against the defendants, or either of them. Defendant Kinney was not bound under his agreement to continue to use the Hornbostel process, but only to pay a royalty on such cigarettes as he should manufacture under the process; and as to the defendants, the "Kinney Tobacco Company," they entered into no agreement with plaintiff on the subject, and were under no obligations whatever to her. Plaintiff, therefore, has no legal claim on defendants, or on Kinney, for payment of royalties after December, 1879, when the defendants ceased to use the Hornbostel process.

As to the use of the word "Caporal" as a special name for cigarettes, it had been used by Kinney on cigarettes manufactured by him before he had ever used the Hornbostel process; and as to the words "Sweet Capo-

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ral," there is no evidence of any agreement as to the use of that name specially on cigarettes treated under that process, or that either Charles Hornbostel or the plaintiff had any exclusive right to use such a name as a trade-mark. The word "sweet," added to the name "Caporal" formerly used by defendant Kinney on cigarettes of his own manufacture, was only a description of the quality of the article, which might be equally applied to cigarettes manufactured by others, and did not constitute a trade-mark to which any one could have an exclusive use (*Godillot v. Hazard*, 44 *Super. Ct.* 427; *Coleman v. Crump*, 70 *N. Y.* 573; *Royal Baking Powder Co. v. Sherrell*, 93 *Ib.* 331; *Van Bill v. Prescott*, 82 *Ib.* 630).

The judgment should be affirmed, with costs.

SEDGWICK, Ch. J., and INGRAHAM, J., concurred.

AMERICAN EXCHANGE IN EUROPE (LIMITED), APPELLANT, v. WILLIAM H. ROBERTSON, RESPONDENT.

Conversion.—*Bill of lading attached to draft—property of discount of draft in goods consigned, where consignee refuses to accept draft or goods.*
—*Collector of port—duty as to freight lien of common carrier on such goods.*

Where a bill of lading is delivered as collateral security, by the consignor to the discount of a draft on the consignee, and the consignee refuses to accept the draft or the goods, or to pay the duties or freight, the holder of the draft and of the bill of lading as collateral, has no absolute legal right to the possession of the goods.

The collector of the port, the goods not being entered in the custom-house, but remaining in his custody subject to the duties, charges and carrier's lien for freight, and he having no notice of any claim by the holder of the draft and bill of lading, is justified in regarding himself as bailee of the carriers, and as holding the goods as their agent and in their behalf and subject to their lien for unpaid freight.

The collector's permitting, upon the carriers filing bills of lading of the goods together with the other papers required by the custom-house regulations, the goods to be withdrawn from the custom-house and re-shipped to the place whence they came, without any notice of any claim on the part of

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a holder of a draft with a bill of lading as collateral, will not render him liable to such a holder as for a conversion of the goods.

The principle of *Strickland v. Barrett* (20 *Pick.* 465), which is, that where the negligence or laches of the true owner causes or seems to justify one, whose possession was not tortious in the beginning but rightful, in dealing with the goods as his own, an action for conversion will not be sustained, might, with justice, be applied to the case at bar.

Corson v. Oliver (2 *Abb. N. C.* 352), and *Pease v. Smith* (61 *N. Y.* 477), are not applicable to the case at bar.

Before O'GORMAN and INGRAHAM, JJ.

Decided April 6, 1885.

Appeal from a judgment against the plaintiff, dismissing the complaint, entered on the decision of a judge, before whom the case was tried, without a jury.

Action for conversion.

The facts appear in the opinion.

Sullivan & Cromwell, attorneys, and *Alexander S. Bacon*, of counsel for appellant, on the questions considered in the opinion, argued:—I. In April, 1883, the title to, and right of possession of the goods, was in plaintiff, for it is undisputed that C. & Co. owned the goods and transferred the bill of lading therefor to plaintiff as collateral security for a draft drawn against the goods and never accepted nor paid (*City Bank v. R., W. & O. R. R. Co.*, 44 *N. Y.* 136; *Indiana Nat. Bank v. Colgate*, 4 *Daly*, 41; *First Nat. Bank v. Kelly*, 57 *N. Y.* 34; *Mechanics & Tra. Bk. v. Farmers' & M. Nat. Bank*, 60 *Ib.* 40; *Colgate v. The Penna. Co.*, 31 *Hun*, 297; *Natl. Bank v. Dearborn*, 115 *Mass.* 219; *Ryberg v. Snell*, 2 *Wash.* 294; *Merchants' Bank v. U. R. R. & T. Co.*, 69 *N. Y.* 373; *Conrad v. Atlantic Ins. Co.*, 1 *Pet.* 386). The principle in the case of *Lee v. Bowlen*, 5 *Biss.* 154; *Cayuga Co. R. R. v. Daniels*, 47 *N. Y.* 635; *Bank of Rochester v. Iowa*, 4 *Ib.* 497; *Schimmelpennick v. Bayard*, 1 *Pet.* 264, also applied.

II. The act that defendant had parted with the possession of plaintiff's goods before demand—innocently or otherwise—and with or without notice of plaintiff's

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ownership—instead of relieving him from liability, made the plaintiff's cause of action complete at once, and relieved plaintiff of the necessity of demand. The moment ~~plaintiff~~ ^{def.} delivered the goods to the White Star line, and thus parted with the possession, he became liable in conversion at once, and without demand, to the owner or whoever might become the owner thereafter (*Pease v. Smith*, 61 *N. Y.* 477; *Ross v. Cassidy*, 27 *How.* 416; *Collins v. Rolli*, 20 *Hun.* 246; *Corson v. Oliver*, 2 *Abb. N. C.* 352; *Spence v. Blackman*, 9 *Wend.* 167). If it should be found that plaintiff's title was not complete until April, 1884 (when *Thurber & Co.* indorsed the bill of lading to plaintiff), defendant is still liable to this plaintiff; for "an action brought by an assignee of goods, for their conversion, is not defeated by the fact that defendant parted with possession before the plaintiff became assignee, and before he made demand on defendant" (*Corson v. Oliver*, 2 *Abb. N. C.* 352; *Ross v. Cassidy*, 27 *How.* 420; *Nichols v. Michael*, 23 *N. Y.* 263; *Latimer v. Wheeler*, 3 *Abb. Ct. App. Dec.* 35).

III. The White Star line had no lien upon the goods and claims no title thereto. They had surrendered possession of the goods six months before, and had lost any lien for freight by such surrender. At any rate the defendant had no right to deliver the goods to a common carrier for the freight. Section 2981, *U. S. R. S.*, provides for the payment of unpaid freight by a sale of the goods, after one year (§ 2973). In short, there is not a scintilla of evidence that the collector delivered the champagne to any one who *had*—not claimed—title or right of possession to said goods. So far as this plaintiff is concerned, the collector might just as well have given the champagne to some friend as a christmas gift, or have consumed it in his own family. The fact remains that this plaintiff is the owner, and the defendant, having had the possession of the goods, refused to deliver them on demand. This is conversion, and the plaintiff is entitled

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to the full value of the goods (Commercial Bank v. Pfeiffer, 22 *Hun*, 327).

Nash & Kingsford, attorneys, and of counsel for respondent, argued :—I. The consignees named in the bill of lading were presumptively the owners (*Sweet v. Barney*, 23 *N. Y.* 335 ; *Angell on Carriers*, § 497 ; *Everett v. Saltus*, 15 *Wend.* 474 ; *Fitzhugh v. Wyman*, 9 *N. Y.* 562 ; *Thompson v. Fargo*, 49 *Ib.* 188). And the rules of the custom house require a bill of lading indorsed by the consignees to enter goods (as plaintiff conceded) and pay the duties. The consignees having refused to enter the goods, the collector, after waiting six months, allowed the carrier, the only other person he knew in the transaction, and from whom he had received them, to withdraw them for re-shipment in bond. The defendant and the carriers both had the right, at this time, to consider the shippers the owners.

II. Defendant cannot be held responsible as for a conversion, because he did not deliver the goods on demand, he having no notice of plaintiff's claim of title until long after the goods had left his control, and he was entitled to show that compliance with the demand was impossible (*Hill v. Covell*, 1 *Comst.* 522 ; *Whitney v. Slauson*, 30 *Barb.* 276 ; *Gillett v. Roberts*, 57 *N. Y.* 28 ; *Carroll v. Mix*, 61 *Barb.* 212 ; *Hoyt v. Baker*, 15 *Abb. N. S.* 495 ; *Hazard v. Abel*, *Ib.* 413). When the rule is stated the other way the obtaining possession must have been tortious (*Nichols v. Michael*, 23 *N. Y.* 269).

III. Plaintiffs must also establish title in themselves and a tortious conversion by defendant (*Hill v. Covell*, 1 *Comst.* 522 ; *Gillett v. Roberts*, 57 *N. Y.* 33 ; *Schroeppel v. Corning*, 5 *Den.* 240).

IV. Thurber, the consignee, really acquired no title to the goods until he accepted the drafts (*Bank of Rochester v. Jones*, 4 *N. Y.* 497 ; *Cayuga Bank v. Daniels*, 47 *Ib.* 632). And his indorsement of the bill of lading to the plaintiff, five months after the goods had left defendant's

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possession, on receiving an indemnity from the plaintiff, in no way improved plaintiff's position.

V. The carriers, the White Star line, having a lien on the goods for unpaid freight, were entitled to resume possession of them, and never parted with them so as to lose their lien. They were obliged, by law, to put the goods in care of the collector on their arrival here, and no owner claiming them for six months, to withdraw them again. Whatever may be the position as between the White Star line and the real owners, the collector could know no one but them, when no consignee appeared, and he allowed them to withdraw the goods. The defendant is entitled to show title in a third party (*Davis v. Hoppock*, 6 *Duer*, 254).

BY THE COURT.—O'GORMAN, J.—This action was brought for the alleged conversion, by the defendant, of 55 cases of wine, valued at \$1,350, which were placed in his custody in May, 1883, as appears by manifest of cargo of steamship "Republic," one of the steamships of the "White Star" line, filed on May 5, 1883.

Defendant was then collector of the port of New York. This wine was shipped in Liverpool, by a firm, named Campbell & Co., and by them consigned to Thurber & Co., of New York. Campbell & Co. drew a draft for £150 on Thurber & Co., the consignees, and the plaintiffs advanced that sum to Campbell & Co., on the draft, receiving two of the bills of lading attached to the draft, as collateral. When the goods arrived in New York, Thurber & Co., the consignees, refused to take them, or to accept the draft, or to pay the duties or freight. The goods were not entered in the custom-house, but remained there in the custody of the defendant, subject to duties, charges, and the carrier's lien for freight. In November, 1883, the agents of the "White Star" line of steamships, the carriers of the goods, acting under instructions from the managers of the line in Liverpool, caused to be filed, bills of lading of the goods, together with such other papers

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as were required by custom-house regulations, and withdrew the goods from the custom-house, and they were re-shipped to Liverpool, the shippers being indemnified by parties in Liverpool, supposed to have been the owners. In March, 1884, about five months after the goods had been thus withdrawn from the custody of the defendant, the plaintiffs caused Thurber & Co. to indorse the third part of the bill of lading to "A. T. Downey & Co.," the firm of Thurber & Co. being indemnified therefor by the plaintiffs. Finding that the goods had been previously re-shipped to Liverpool, demand was made on defendant, and this action was begun.

From the time of the arrival of this wine in New York until March, 1884, no notice was given to the defendant, of any claim on the part of the plaintiffs of any lien upon, or any right or claim to the possession of this property, or of any connection whatever on their part with it.

The manifest of the steamship "Republic," showing that the wine was consigned to Thurber & Co., did not convey any notice to defendant that the plaintiffs had or claimed any lien upon it, and the plaintiffs took no steps to make any lien which they claimed to have, effectual; nor had they, during all the time during which the wine remained in the custody of the defendant, any absolute legal right to the possession of it.

It is held that an action for conversion cannot be sustained, unless at the time of the alleged conversion, the plaintiff had the legal right to the property converted (*Clement v. Yturria*, 81 N. Y. 285).

Under these circumstances, the defendant was justified in regarding himself as bailee of the carriers, during all the time the wine was in his custody, and as holding possession of it as their agent, and on their behalf, and subject to their lien for unpaid freight (*Western Transportation Co. v. Barber*, 56 N. Y. 544; *Rogers v. Weir*, 34 *Ib.* 463).

It is, no doubt, held that an action in favor of the true owner will not be defeated, merely because the defendant

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has parted with the property before commencement of the action. This is on the theory, that the act of the defendant in parting with the possession, without the consent of the true owner, is unlawful (*Corsan v. Oliver*, 2 *Abb. N. C.* 352). In cases, also, where the defendant never acquired any legal title to the goods in his possession, as where goods were stolen from the true owner and came into the defendant's possession innocently, as purchaser, and without knowledge or suspicion of the theft, there it is held that he is nevertheless liable for conversion (*Pease v. Smith*, 61 *N. Y.* 477). But these decisions do not apply to the case at bar.

The defendant here came into possession of this property lawfully, and plaintiffs had not, at the time of the withdrawal of the goods from the custody of the defendants, any absolute legal right to the possession thereof. It seems, also, that where the defendant's possession of the property, as in the case at bar, is not tortious in its beginning, but rightful ; and the negligence or laches of the true owner causes or seems to justify defendant in dealing with the goods as his own, an action for conversion will not be sustained (*Strickland v. Barrett*, 20 *Pick.* 465). This principle might, with justice, be applied to the case at bar, where the plaintiffs left the defendant in ignorance of any lien they claimed to have on the property, until long after he had parted with its possession.

But the defendant, during all the time in which he had custody of this property, was under no obligation to the plaintiffs and owed them no duty, and plaintiffs had no right to demand the possession of the property, nor had they, during all that time, any cause of action against him.

The findings of the learned trial judge are sustained by sufficient evidence, and the judgment below should be affirmed, with costs.

INGRAHAM, J., concurred in the result.

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HENRY M. BRADHURST, RESPONDENT, v. THE
MAYOR, &c., OF THE CITY OF NEW YORK,
APPELLANTS.

Award to unknown owners—payment to chamberlain after action commenced, pleaded as defense—effect on costs and interest.

In an action to recover an award to unknown owners, payment to the chamberlain, pleaded as a defense, does not, in any way, affect the question of costs upon a recovery by plaintiff. Its only effect is to stop interest on the award from the date of the payment to the chamberlain.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 6, 1885.

Appeal by defendants from judgment entered upon referee's report.

The facts appear in the opinion.

E. Henry Lacombe, counsel to the corporation, and
R. H. Smith, of counsel for appellants.

Vedder Van Dyck, attorney, and of counsel for respondent.

BY THE COURT.—O'GORMAN, J.—The plaintiff's action against the mayor, &c., for recovery of the amount of the award made to unknown owners, was well brought (2 *R. L.* 1813, 183; *Fisher v. Mayor, &c.*, 57 *N. Y.* 344).

After issue joined, the defendants paid to the city chamberlain the amount of the award, and served on plaintiff an amended answer, in which the fact of that payment to the city chamberlain was set up as a defense. No tender of payment of this amount was made by the defendants to the plaintiff.

The action was referred to a referee to hear and determine, and the referee found in favor of the plaintiff, with costs.

Defendants claimed that the city was not chargeable with any costs or disbursements accrued since February

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3, 1885, the date of the said payment by them into the hands of the city chamberlain. The question here is whether the defendants were right in that contention.

The payment of the amount of the award into the hands of the city chamberlain is not equivalent to payment to the plaintiff, and has only the effect of stopping the running of interest on the amount. It is only the transfer of the amount into the hands of the proper custodian, to be held by him for the benefit of whomsoever should prove himself to be legally entitled to payment. The payment of the award in the case at bar during the pendency of the action, did not terminate the action, or render its continuance to final judgment unnecessary to plaintiff's assertion of his right to payment. The issue raised by the amended answer still remained to be determined, whether plaintiff was the person entitled to the money, and until that issue was determined in his favor, he could not get it. There is no process of law, other than an action, by which payment could be enforced (*Re Hatch*, 43 *Super. Ct.* 89.)

All the defendants gained by payment of the award into the hands of the city chamberlain, was cessation of the running of interest from that time. The right of the successful party to judgment in the action, and to costs of the action, was not affected by it.

Cutter v. Mayor (92 *N. Y.* 166), is not in point.

The judgment should be affirmed, with costs.

SEDGWICK, Ch. J., and INGRAHAM, J., concurred.

Statement of the Case.

PEOPLE, &C., EX REL. THEODORE ROOSEVELT, ET AL., RESPONDENTS, v. FRANKLIN EDSON, IM-
PLEADED, ET AL., APPELLANT.

Injunction ex parte—power to grant.—Common Pleas and judges—not county court or county judges.—Injunction order—when void, and effect as to contempt for violating.—Executive officer—power of courts to control—Power of mayor to appoint is executive.

An injunction can only be granted *ex parte*, by the court in which the action is brought, or a judge thereof, or a county judge. The provisions of section 606 of the Code of Civil Procedure alone apply; those of sections 277 and 772 do not.

The court of common pleas of the city and county of New York is not a county court, and the judges thereof are not county judges.

Consequently *held*, an *ex parte* injunction order made in an action pending in this court by a judge of the court of common pleas of the city and county of New York, is without jurisdiction and void.

A violation of a void injunction order is not punishable as contempt.

The power of a court of equity to control the acts of an executive officer is limited to such acts and duties as are merely ministerial, and involve no exercise of discretion (by INGRAHAM, J.).

The power of the mayor of the city of New York to appoint a commissioner of public works and a counsel to the corporation, is an executive power of the state vested in him by the constitution and laws, and involves the exercise of discretion. An *ex parte* injunction restraining him from exercising, or controlling him in the exercise of such powers of appointment is *therefore void*; and his disregard of it is not a contempt (by INGRAHAM, J.).

Chapter 531, laws 1881, has no application to such a case, the action of the mayor not being an act on behalf of a county, town, village or municipal corporation (by INGRAHAM, J.).

People v. Dwyer (90 N. Y. 402); *People v. Sturtevant* (9 *Ib.* 263), distinguished (by INGRAHAM, J.).

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 13, 1885.

Appeal from an order convicting defendant Franklin Edson, of contempt in disobeying an *ex parte* injunction-order.

The injunction order was made to accompany a summons in an action brought, or about to be brought, in

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this court. The order was signed by a judge of the common pleas for the city and county of New York. The defendant disregarded the order by doing what the terms of the order enjoined him from doing, and, in certain proceedings to punish him therefor, was held to be in contempt.

Further facts appear in the opinions.

For decision below by FREEDMAN, J., see 51 *Super. Ct.* 238.

For decision dissolving the injunction order, by TRUAX, J., see *Ib.* 227.

Sewell, Pierce & Sheldon, attorneys, *David Dudley Field* and *Robert Sewell*, of counsel for appellant, on the questions considered in the opinion, argued :—I. The first question which arises in this controversy, is as to the authority of Hon. MILES BEACH, judge of the court of common pleas for the city and county of New York, to grant an injunction order in a case pending in the superior court. The only authority which exists for the granting of injunctions is section 606 of the Code, which provides that “an injunction order may be granted by the court in which the action is brought, or by a judge thereof, or by any county judge, and where it is granted by a judge, it may be enforced as the order of the court.” Now, this order, to begin with, was not granted by the court. It was not granted by a judge of the court, and the question is, whether or not it was granted by a county judge. And then the question further arises, whether the word “judge” in the last clause of the section, is to be confined to a judge of the court, or whether it includes a county judge, and also what is meant, by its being enforced as the order of the court.

And first, it is very clear that the Honorable MILES BEACH did not, when he granted this order, purport to act as a county judge; he did not sign his name as a county judge, but, on the contrary, described himself as a “judge of the court of common pleas for the city

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and county of New York." We are to suppose from this signature, that he thought that he was granting the injunction out of the court of common pleas, because he signed himself as a judicial officer of that tribunal. If he supposed or thought that he was acting as a county judge, he should have so designated himself in his signature, so that he would inform the persons to whom his mandate might come, what his official authority was for issuing such an order.

It seems clear that no judge of the court of common pleas, as such, has any right to grant an order in a cause depending in the superior court, and that it is only by virtue of an extra-judicial authority as county judge, that he has any right to sign an order of the superior court. If, then, his right depends upon such official designation, is it not clear that he should have set forth the capacity in which he was acting, by such an addition to his signature, as would convey to the person sought to be enjoined, information respecting the jurisdiction of the person who sought to enjoin him?

The language of the section referred to, "where it is granted by a judge," refers undoubtedly to the preceding portion of the sentence; whether it includes only judges of the court, where they act out of court and make the order, or whether it includes also an order granted by any county judge, is open to discussion; and the further suggestion that the order may be enforced as an order of the court when so made, is one which opens up a branch of inquiry as to the meaning of the word "enforced" in this section.

Is this proceeding taken for the purpose of enforcing that order? If it is, then the answer to it is explicit and plain, and ought not to take ten minutes to argue and decide. The order is dead and gone; the court has decided that it ought not to have been issued; the court has refused to continue it; how, then, can any action be taken to enforce it? This is the only authority which can be cited for this proceeding. There is no power in this court

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to punish for contempt, committed with respect to the order of any other court but this, or any other judge than the six judges composing this tribunal, except this last clause of section 606, which says that the order may be enforced as the order of the court. It may be, that if this order was still in force, and that the defendants contemptuously refused to obey it, proceedings for its enforcement in the nature of a proceeding to punish for contempt, might be brought within the section; but in the present aspect of this case, with the order gone, wiped out, declared null and void, and no order remaining calling for enforcement, it would seem as if this court were deprived of any authority whatever, to punish for disobedience of such a vacated order.

The proceeding is for a criminal contempt. A perusal of section 8 of the Code of Civil Procedure will show that the court has power to punish for a criminal contempt, a person guilty of either of the following acts and no others. It then recites certain acts which are so punishable, and among them is, "willful disobedience to its lawful mandate;" and this is the only act which can possibly be made the basis of a proceeding to punish the defendant for contempt; because the court has no power to punish for any other contempts than those contained in the eighth section, and this is the only one contained in the eighth section about which any question is made.

Now, it will be observed, that the power of the court is limited to punish a person for willful disobedience to its lawful mandate. What lawful mandate of this court has Mr. Edson violated? Can it be said that an order signed by MILES BEACH, as judge of the court of common pleas, for the city and county of New York, upon a day, when—this court will take judicial cognizance—its six judges in full health, in the enjoyment of their physical and mental powers, were here in the city, ready to discharge all their lawful obligations—can it be said that this order so signed, is a lawful mandate of this court?

It will not do to say that it is a lawful mandate—it

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must be a lawful mandate of this court, before this court can punish for contempt; and while a county judge has the undoubted authority to sign an injunction in an action in the superior court, it cannot for a moment be pretended, that if a county judge should sign such an injunction, and should not describe himself as a county judge, anybody could be punished for contempt for disobeying an order so issued. Now, that is just this case. MILES BEACH does not describe himself as a county judge, does not pretend to act in such a faculty, but signs himself as if he were granting an order in the court of common pleas, which probably he thought he was granting, when he signed the paper in question.

If any contempt has been committed here, it has been a contempt against the court of common pleas, and this court is not authorized by law to punish such a contempt. And, as we have said before, the order cannot be enforced as the order of the court, because it has been set aside and vacated. There is no order of the court left to enforce.

It has been repeatedly held in this state, that no proceedings to punish for a contempt could be taken, after the order which was disobeyed was set aside. It may be that while an order is in full force, in a case where the court or judge granting it had jurisdiction to make it, it is entitled to obedience, and that while in such force, proceedings for disobeying it might be entertained by the court. But the principle upon which this stands, is, that the orders of the court while in force are entitled to consideration, and that the court will see that they are obeyed. But the principle does not hold after a full argument is had, and it is found that the order ought never to have been granted, and that the act which was forbidden by the order, was an act which the defendant had an undoubted legal right to perform, and which the order wrongfully interfered with.

So, too, if an injunction order is too broad, it is said that notwithstanding that, it ought to be obeyed. And

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we accede to this doctrine ; but if it is modified, no proceeding can be taken to punish for contempt in disobeying it, with respect to the modification after the modification has been made, because the court has confessed, by the modification, that the order was too broad, and ought never to have been granted to that extent. To punish for contempt after the order violated has been vacated, is for the court to say to the person charged with contempt : "It is true we have made an order that we never ought to have made ; it is true that we have commanded you to refrain from doing an act, which we ought never to have commanded you to refrain from doing, and that our action in that respect was improvident, unwise and illegal ; but, notwithstanding that, we will punish you for daring to set your private judgment up against the judgment of the court, and doing that which we forbade you to do." It is submitted that this doctrine can find no place in the enlightened jurisprudence of the nineteenth century.

The following cases sustain our proposition under this head : *Robertson v. Bingley*, 1 *McCord Ch.* 333 ; *Peck v. Yorks*, 32 *How. Pr.* 409 ; *Chapman v. Dyett*, 11 *Wend.* 31 ; *Moat v. Holbein*, 2 *Edw. Ch.* 188 ; *Money v. Jorden*, 1 *Eng. L. & Eq.* 146.

This proposition was presented to the learned judge below, but he answered it on the argument by saying, that this court in the case of the *Atlantic, &c. Tel. Co. v. Baltimore, &c. R. R. Co.* (46 *Super. Ct.* 377), has decided that a violation of an order of injunction might be punished, after the order had been vacated. A reference to this case shows that the learned judge's memory of it was not accurate. As we read the case, it simply decides, that an injunction order which is too broad, should nevertheless be obeyed, and that a violation of the plaintiff's rights by the defendant, within the scope of that part of the order which is upheld by the court, may be punished. This is exactly the doctrine we contend for here. If the court has in that case, or in any other case,

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decided, that it will punish disobedience of every order made in a case in which the court has jurisdiction, as a criminal contempt, irrespective of the question of legal right to make such an order ; then we respectfully suggested, that this is a favorable opportunity of retreating from an untenable position.

A criminal contempt of necessity supposes, that a lawful order of the court has been willfully disobeyed. How can that be criminal which the court itself decides is justifiable, when it decides that the order never should have been granted ? Again, if there is a technical disobedience to an order, how can it be held to be criminal, when the court decides, no matter for what reason, that the judge should not have granted the order ?

II. We say, too, that this injunction is void, because the plaintiffs have no capacity to sue ; the court did not have jurisdiction of the persons of the plaintiffs for the purpose of granting an injunction. It is not necessary to remark to this court, that a tax-payer of the city of New York, has no authority to maintain an action to set right the municipal government of this city, or even to restrain waste in the city property or funds. The appropriate officer to bring such an action is the attorney-general ; it is a public wrong, and it ought to be vindicated by a public officer. The authorities for this are so numerous that they must be familiar to all. It was settled in this state as long back as the cases of *Wetmore v. Story*, 22 *Barb.* 484 ; *De Baun v. Mayor*, 16 *Ib.* 393 ; *Ely v. Connolly*, 7 *Abb. N. S.* 8 ; *Doolittle v. Supervisors of Broome*, 18 *N. Y.* 155.

The question is whether the order commanding him to desist from filling the vacancies, was within the jurisdiction of the superior court. To put the question is to answer it. The order was no more within its jurisdiction on December 30, 1884, than it would have been on December 30, 1883. If valid, it would make the court, and not the mayor, judge of the fitness of persons to be nominated, and if he wished to nominate he would have to ask the

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court, and it would answer of its own knowledge or appoint a referee.

The plaintiffs, then, had no standing in court to ask for the injunction, unless they have gotten it by virtue of some legislative act ; and in accordance with these views, it will be seen, from the papers, that they seek to get their authority from the act of 1881 (chapter 528), which is itself an amendment to the act of 1880. A bare reading of the act will show that the intention of the legislature was to give to citizens of New York, who were tax-payers, and who had paid taxes for a certain time, the right, which they did not have before, to maintain actions to restrain or prevent improper expenditure of the public funds, or wasteful interference with the public property. The words "illegal act" contained in the statute, must be construed in connection with all the other words of the statute, and must be construed to mean an illegal act, in connection with the property of the city.

It cannot be imagined that the legislature intended to interfere with the discretionary powers of the mayor of the city of New York, and to give any citizen the right to enjoin him from the exercise of his discretion, whenever, in the views of that citizen, he was about to exercise it unlawfully. The law imposed upon the mayor of the city of New York, the duty and the power of making appointments to office ; that law cannot be repealed by implication, and the statute in question gives these plaintiffs not any color of right to maintain an action, to prevent the mayor from exercising his lawful authority. Where the law gives to officers powers which require the exercise of sound judgment, the correction of any errors that they may make in the exercise of their functions, belongs to some other tribunal than a court of equity, and belongs to some other plaintiff to set them right, than a tax-payer of the city of New York, acting under the authority of this statute ; no matter who the plaintiff is, chancery has no jurisdiction to interfere by injunction. To suppose that this act, by the use of the words "any illegal act," intended

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to reach the executive acts of appointment of officers, conferred upon the mayors of cities by the legislature, is to disturb the well-settled rules of construction of statutes, and to increase enormously the powers of courts of equity, sheerly by implication, beyond those powers which centuries of undisturbed judgments had rendered settled and definite. Such a construction can never be put upon a statute, unless the language of it leaves no other alternative to the court.

The counsel here commented on and distinguished *People v. Sturtevant* (9 N. Y. 263); *Hunt v. Hunt* (72 *Ib.* 217); *Lange v. Benedict* (73 *Ib.* 12); *Mayor v. N. Y. & Staten Island Ferry Co.* (64 *Ib.* 232).

The doctrine, that any order of a court which has jurisdiction of the subject matter of the action, must be obeyed by the citizen, is one inimical to freedom, and to the just rights of the people. It is entering into a position open to the most serious abuses, as to the exercise of the powers of the judges of the courts. It places it in the power of a man, simply because he happens to be a judge, to thwart the administration of high municipal officers, of the matters confided to their charge by the people of this state. It interferes with them in their obligations to the law, and comes between them and their consciences in the discharge of their duties.

The mayor was advised by counsel that the injunction was void. He, believing the advice of his counsel, acted upon it, and now it is sought, by the order of the judge below, to turn that action into a criminal offense, which we say is a monstrous doctrine, that calls for interference from this appellate tribunal (*Mooers v. Smedley*, 6 *Johns. Ch.* 28; *Leroy v. Mayor*, 4 *Ib.* 352; *Patterson v. Mayor*, 1 *Paige*, 114; *Atty. General v. Mid. Kent R. Co.*, *L. R. Ch.* 100; *Atty. General v. Gt. N. R. R.*, 4 *De Gex & Sm.* 75; *Atty. General v. R. R. Co.*, 35 *Wis.* 425; *Atty. General v. Utica Ins. Co.*, 2 *Johns. Ch.* 371; *Whitney v. Mayor*, 1 *Paige*, 548; *Mayor v. Messerole*, 26 *Wend.* 132; *N. Y. Life Insurance Co. v. Supervisors of New York*, 4

 Respondents' points.

Duer, 192 ; *Walker v. Davisson*, 4 *Paige*, 229 ; *Clark v. Brooklyn Bank*, 1 *Edw.* 361 ; *Ward v. Kelsey*, 14 *Abb. Pr.* 106).

Charles P. Miller, attorney, and of counsel for respondents, on the questions considered in the opinion, argued :—I. A judge of the court of common pleas for the city and county of New York, has the powers of a county judge, and as such is authorized to issue an injunction in an action pending in the superior court (*Wood v. Kelly*, 2 *Hill*. 334 ; *Lang v. Brown*, 6 *Hun*, 256 ; *Matter Morgan*, 56 *N. Y.* 629 ; *Code Civ. Pro.* §§ 606, 772, 277, 3343).

II. Chapter 531 of the laws of 1881 authorizes the plaintiffs to bring this action. An examination of these acts will show that the statutes were originally confined to actions preventing waste of public property ; but that the act of 1881 gives a new right in allowing the action to be brought to restrain “any illegal official act on the part of such officers,” as well as to prevent waste, &c., which alone was permitted by the former statutes.

III. The court had power to enjoin a corrupt and illegal exercise of the appointing power by the mayor (Laws 1881, chap. 531 ; Opinion of TRUAX, J., 51 *Super. Ct.* 227 ; Opinion of FREEDMAN, J., *Ib.* 238). The argument, that the acts enjoined were legislative powers, or statutory duties, beyond the control of any court, proceeds on the theory that a mayor and board of aldermen within their statutory powers are analogous to a state legislature, federal congress, parliament or other sovereign legislative body. This idea is wholly erroneous. There is nothing sovereign about the powers of a mayor and board of aldermen. Such officers or board are merely a part of the directorate of a corporation, of a public corporation it is true, but of a kind which, from time immemorial, has, in all its functions, been peculiarly subject to judicial control (*Davis v. Mayor, &c.*, 1 *Duer*, 450 ; *People v. Sturtevant*, *supra* ; *People v. Dwyer*, *supra*). The meaning of

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the statement that a court will not interfere with the exercise of a discretionary power lodged in a person or corporation, is that it will not substitute its own discretion for that of the person or corporation, and exercise the power. But it will restrain an illegal or improper exercise of the discretion in either. In the application of these rules there is no difference between municipal and private corporations (*Davis v. Mayor, &c.*, 1 *Duer*, 497).

IV. That the injunction was vacated before the motion to punish for contempt was argued did not deprive the court of power to punish the contempt. This court has not followed *Moat v. Holbein* (2 *Edw. Ch.* 188), or *Peck v. Yorks* (32 *How. Pr.* 409). See *Atlantic Tel. Co. v. B. & O. Tel. Co.* (46 *Super. Ct.* 377). Even if *Moat v. Holbein* is good law, it refers only to a case in which the contempt proceeding is begun *after* the injunction has been vacated (*Cook v. People*, 16 *Ill.* 534). This proceeding was begun *before* the injunction was vacated.

BY THE COURT.—SEDGWICK, Ch. J.—The judge of the common pleas who made the injunction order in this case had not a legal power to make it. The validity of the exercise of such a power, if it exist, must be found in some section of the Code of Civil Procedure. It will be necessary to examine only sections 277, 606 and 772. It will be expedient to examine section 772 in the first place. It occurs in title V. with the heading “motions and orders generally.” Section 772 is headed, “What judges may make orders out of court without notice.” It proceeds to declare that where an order in an action may be made by a judge of the court out of the court, and without notice, and the particular judge is not specially designated by law, it, except it be to stay proceedings after verdict, report or decision, may be made by a justice of the supreme court, or by a judge of a superior city court, within the city where his court is located, or by the county judge of the county where the action is triable, or in which the attorney for the applicant resides. If an injunction order

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is within the meaning of the clause that has been cited, then the order in this case had validity, not because the judge signing the order was a county judge, but because he was a judge of a superior city court. The clause was not meant to embrace an injunction order. It was a provision that respected orders in general, without a specific reference to any class of orders with peculiar characteristics. The general class of orders was those that might be made by a judge out of court without notice.

It is a familiar rule of statutory construction, that a statute that provides in respect of a particular case, is not repealed by a statute that describes a general class, although the particular case would be verbally within the general terms, unless an intention to repeal is otherwise manifested (*Matter Comm'rs Central Park*, 50 N. Y. 493; *Van Denburgh v. Village of Greenbush*, 66 *Ib.* 1; *People ex rel. Ross v. City of Brooklyn*, 69 *Ib.* 605). The principle is applicable *a fortiori*, to different sections of one act, the whole of which becomes a law at one time. And therefore, if there be elsewhere in the Code, a special provision as to injunction orders, that special provision controls.

As to orders granting provisional remedies, and that may be made by a judge out of court, without notice, the Code has made special or particular provisions, which it was unnecessary to make if section 772 was meant to be the enactment as to them. By section 556, an order of arrest, except, &c., must be obtained from a judge of the court in which the action is pending, or from any county judge. By section 638, a warrant of attachment may be made by a judge of the court or by any county judge. By section 606, an injunction order may be granted by the court in which the action is brought, or by a judge thereof, or by any county judge. No one can fail to observe that in these several cases the limitation of the powers to grant the orders have been made with some purpose that relates to the character of the remedy. If these special provisions had been placed in section 772 at

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the end of the general words that have been given, it would at once be seen that there was no inconsistency, and that the special provisions were to be followed according to their own terms. The separation of them by intervening sections, does not make them not to be the law, or prevent the application of the rule of construction that has been adverted to.

It is argued that a part of section 772, and not yet noticed, shows that the intention was that the general language should refer to injunction orders. Such an order grants a provisional remedy. That part immediately follows what has been quoted, and is, "Where such an order grants a provisional remedy, it can be vacated only in the manner specially prescribed by law," &c. The argument is that the words "such an order," recognize that the general words as to orders before used, embrace orders granting provisional remedies. It is certainly true that orders for provisional remedies may be made by a judge out of court, and it must be supposed that the law-makers did not lose sight of this when the general words were used. This is not all that needs consideration here. The law-makers also knew that the general words did not exclude the operation of special provisions as to the granting of particular kinds of orders. These special provisions were to be combined with the general provision, and it was in reference to all of them together, as being the law, that the part now under consideration proceeds. Therefore the words "such an order" must not be held to repeal any provision that had been specially made as to certain classes of orders, or, in other words, to affect any provision as to the court or judge authorized to make orders. It was an independent provision, as if made in another section, and meant that where an order that may be made by a judge out of court (which is the meaning of "such an order"), grants a provisional remedy, it can be vacated only, &c.

The construction now given to section 606 gains strength from these words in it: "except where it is other-

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wise specially prescribed." There is a special prescription in section 605. There is no special prescription in section 772, which is in general terms. Therefore, there is almost an explicit declaration that section 606 furnishes the only rule as to the power to make injunction orders.

What is the difference between the respective applications of sections 772 and 606? By section 772, other orders than injunction orders may be made by the judges of the supreme court, or of the common pleas, or of a superior court, or by a county judge, with indifference as to the particular court in which the action may be. By section 606, such an order can only be granted by a judge of the court where the action is, or by that court, or by a county judge. It is not necessary to state the reasons for these varying limitations. It is enough to perceive that the limitations are so marked, that they cannot be supposed to be absent from the intention of the legislature.

The inquiry remains, whether, within the meaning of section 606, a judge of the common pleas is a county judge. A county judge is a specific title used in the constitution and statutes to identify a certain judicial officer, with peculiar powers, and the head of a county court. Section 14, article 6, Constitution of 1846, says there shall be elected in each of the counties, except the city and county of New York, one county judge. He shall hold the county court, &c. Section 15 of the same article, as amended December 9, 1869, continued county courts and county judges by these titles. The Code of Civil Procedure so classifies these courts and officers as courts of common pleas, superior courts, county judges and county courts, in such an exact way, that they cannot be confused, and it must be said that the one is not the other.

It may be argued that a judge of the common pleas has the power of a county judge. No statute to such an effect has been cited. If there were one, it would not avail against a statute, which in respect of a particular class of orders in effect names a judge of the court of common pleas and a county judge, allowing the former

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to grant the order, if the action be in his court, or if it be not, then by a county judge, or a judge of the court in which the action is.

This, however, by no means exhausts the discriminations of the statute. The following is significant : There are three classes of authorized makers of injunction orders. The system of classification had some ground which calls for respect as much as does the meaning of words. The first class is of courts in which the action may be, the second is of the judges of such courts, the third is of county judges. There is no other class of judges than those of the court where the action is. If a judge who is not a county judge, but is assumed to have the power of a county judge, is for that reason by construction authorized to make the order, not being a judge of the court where the action is, the second class, and its reason, are obliterated.

The subject matter of such an inquiry as the present is in every case, what do the words mean, in the particular act or section where they occur ? It is a rule of general application that legal terms have their legal meaning, unless there be some indication to the contrary. Under these propositions, the cases that have been cited to show that a judge of the common pleas has the power of a county judge, or is a county judge, should be examined.

Morgan's case (56 N. Y. 629), is not reported in full. The digests give no reference to the decision below. A memorandum only of the case in the court of appeals is made, and the head-note alone gives information as to the decision. It is, "The term 'county judge,' as employed in the act of 1860, 'to secure to creditors, a just division of the estate of debtors who convey to assignees,' &c. (chap. 348, laws of 1860), and the various acts amendatory (chap. 860, laws of 1867 ; chap. 92, laws of 1879 ; chap. 838, laws of 1872, and chap. 363, laws 1873) includes the judges of the court of common pleas for the city and county of New York, and the jurisdiction conferred by said acts upon the county judge is rightfully exercised by

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the judges of the said court of common pleas, when the debtor resides in the city of New York."

The acts, outside of the words to be construed in them, namely, "county court" and "county judge," provided beyond controversy for the regulation of assignments for benefit of creditors in every county of the state. It would be inconceivable that it was not intended to apply to the county of New York. The judicial agents for the enforcement of the acts, were described as county court and county judge. The particular question was, when the acts applied to all of the counties of the state, what did they mean by county judge as applied to the county of New York, when there was no county judge proper? The conclusion was that from the history of the common pleas and its former jurisdiction and nomenclature, the act meant that court, for the purposes of the enforcement of the act in the county of New York. This did not involve that in the county of New York, the common pleas or its judges, acted because they had the power of a county court in a proper sense, or were county judges proper, but they acted as a court of common pleas, or a judge of it, *proprio vigore*. Such a result was inevitable, after it had been held that the face of the acts showed that the words county judge were used, not in a restricted legal and technical way, but in a general sense.

When the acts referred to were repealed by section 28, chapter 466, laws of 1877, it was deemed prudent to enact, by section 24, that a judge of the common pleas of the city of New York, "may exercise all the powers of a county judge for said county for the purposes of this act."

In *Wood v. Kelly* (2 *Hilt.* 337), the only remark that could apply to the subject, was made by a single judge as an additional reason to those given by another judge for affirming an order allowing an amendment. There is no doubt that the remark was correct. It, however, only applied to the court possessing the power of a county court, and not to any judge of either court. It was based upon section 6 of the laws of 1854, chapter 198, entitled

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“An act in relation to the court of common pleas for the city and county of New York.” Section 6 was repealed by chapter 417 of the laws of 1877.

Lang v. Brown (6 *Hun*, 256), is cited. It states that judges of the common pleas are county judges on the authority of *Matter of Morgan* (56 *N. Y.* 629). We have seen that that case only declares that within the meaning of the acts then involved, county judges indicated judges of the common pleas. To maintain the proposition under the Code of Civil Procedure would be to disregard fundamental distinctions very carefully made in it. The statute before the court was a section of the revised statutes. The opinion there says that by section 27, laws of 1847, p. 638 (the judiciary act) county judges are clothed with the powers that a judge of the court of common pleas, being, &c., could exercise. This does not show that a judge of the common pleas is clothed with the powers of a county judge. The section could not be read by substituting for county judge, a judge of common pleas, without considering it the equivalent of an enactment that a judge of the common pleas is clothed with the powers of a judge of the common pleas. In fact, the section has been repealed by chapter 417 of the laws of 1877.

In *People ex rel. Ireland v. Donohue* (15 *Hun*, 446), it was held that under section 556 of the Code of Civil Procedure,—which provides that an order of arrest may be granted by a judge of the court where the action is brought, or by the county judge,—a judge of the common pleas is a county judge. The making of the order was not said to be valid under section 772, and no particular examination of the question was made, but the decision was placed upon *Matter of Morgan* (56 *N. Y.* 629). It is therefore to be deemed but a reiteration of the ruling in that case, the effect of which has been examined.

Nor does section 277 support the order. That provides that in an action or special proceeding, brought in a superior city court, an order may be made without notice by the county judge of the county where the court is

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situated, or of the county where the attorney for the applicant resides, in a case where a judge of the superior city court might make the same out of court. It seems to be clear that the judge who made the order is not the county judge of this county, nor did he make it as such. It would seem only necessary to say that the section refers to the power of the county judge, and not to the power of a superior city court judge.

As the making of the order was not authorized by law, the appellant was not bound to obey it, and was not in contempt for disregarding it.

The order appealed from should be reversed, and an order entered dismissing all proceedings, with costs.

O'GORMAN, J., concurred.

INGRAHAM, J.—[Concurring in result.]—The action in which the injunction order hereinafter mentioned was granted, was commenced by the service of the summons on the defendants. No complaint was served or presented to the court.

It appears, however, from the affidavit on which the injunction was granted, that the action was brought for the purpose of preventing the appointment, by the mayor and board of aldermen of the city of New York, of a counsel to the corporation, the head of the law department of the said city, and of a commissioner of public works of said city, on the ground that the appointment was about to be made in pursuance of a corrupt combination between the defendants in the said action and others.

On presentation to a judge of the court of common pleas of the summons in the action, and certain affidavits and an undertaking, an order was granted, providing that the defendant Edson, the mayor of the city of New York, be enjoined, restrained and commanded to desist from appointing, nominating or confirming the nomination of any person to the office of commissioner of public works, or of counsel to the corporation, of and for the said city of

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New York, until the entry and service of an order therein, changing or modifying the force of the said order.

By section 21 of the charter of 1830 (*Laws* 1830, p. 125), it was provided that the executive business of the corporation of New York should thereafter be performed by distinct departments, which it should be the duty of the common council to re-organize and appoint for that purpose. In pursuance of the direction contained in this section, ordinances were adopted by the common council creating the street commissioners' department, and the office of attorney and counsel to the corporation, and prescribing the duties of the officers thereof, and by the revision of the ordinance of 1845, the said departments were continued and the duty of the heads of the departments defined.

The powers and duties of the street commissioner under the revised ordinance of 1845, were, by section 316 of chapter 410, of the acts of 1882, known as the consolidation act, given to the department of public works, and by section 38 of the said act, the head of the department of public works was called the commissioner of public works, and was to hold office for four years, and until his successor shall be appointed and qualified.

By the same act, it was provided that the head of the law department should be called counsel to the corporation, and the duties performed by the counsel and attorney to the common council under the ordinance of the common council before mentioned were given to the law department.

By section 106 of the same act, it was provided that the mayor shall nominate and, by and with the consent of the board of aldermen, appoint the heads of departments and all commissioners.

By the constitution of 1846, which took effect on January 1, 1847, it was provided by section 2, article 10, that "all city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and vil-

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lages or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose." At the time this provision went into effect, there were in existence officers of the corporation of the city of New York, performing most of the duties now performed by the commissioner of public works and the counsel to the corporation.

The provision of section 2, of article 10, of the constitution, applied to such officers as were in existence at the time of the adoption of the constitution (*Devoy v. Mayor, &c.*, 36 N. Y. 449; *People v. Draper*, 15 *Ib.* 532; *People v. Albertson*, 55 *Ib.* 50).

If the legislature had provided that the commissioner of public works and counsel to the corporation should be elected by the people, it could not be said that the people, in voting for such an officer, acted on behalf of the corporation of the city of New York. If, in the absence of the constitutional provision, the legislature had created the office of commissioner of public works, and either appointed an individual to fill that office, or authorized the governor to appoint the officer, it could not be said that the legislature or governor, in making the appointment, acted on behalf of the municipal corporation; and yet the act of appointment would be the same.

It appears, therefore, that the mayor of New York, in appointing the commissioner of public works and the counsel to the corporation, acted not on behalf of the municipal corporation, but under the authority conferred on him by the act of the legislature designating him as the officer to carry into effect the provisions of the constitution.

The power of a court of equity to control the acts of an executive officer was early presented to the supreme court of the United States in the case of *Marbury v. Madison* (1 *Cranch*, 137), and Chief Justice MARSHALL, in delivering the opinion of the court in that case, limits the power of the court to control an officer of the government to such duties as are merely ministerial and involve no exercise of discretion. In discussing this question, he

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says : " It is not wonderful that in such case as this, the assertion by an individual of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should, at first view, be considered by some as an attempt to intrude into the cabinet and intermeddle with the prerogatives of the executive. It is scarcely necessary for the court to disclaim all pretensions to such jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment. The province of the court is solely to decide on the rights of individuals, not to inquire how the executive or executive officers perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."

In the case of *Decauter v. Spaulding* (14 *Peters*, 515), Chief Justice TANEY, in delivering the opinion of the court, says : " The interference of a court with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief, and we are quite satisfied that no such power was ever intended to be given to them, . . . and in such a case (one involving judgment and discretion), the circuit court had no right by mandamus to control his judgment and guide him in the discretion which the law had confided to him. We are, therefore, of the opinion that the court below was not authorized by law to issue the mandamus, and committed no error in refusing it, and as we have no jurisdiction of the acts of the secretary in this respect, we forbear to express any opinion of the construction of the legislation in question."

In *Gaines v. Thompson* (7 *Wall.* 347), which was an action for an injunction to restrain the secretary of the interior and the commissioner of the land-office from canceling an entry of certain lands in Arkansas, in which the plaintiff and others claimed an equitable right, the supreme court of the United States, on the authority of the cases above cited, held that a public officer to whom

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public duties are confided by law, is not subject to the control of the court in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and, however the court, in ascertaining the rights of parties in suits properly before them, may pass upon the legality of their acts after the matter has once passed from their control, there exists no power in the court by any process to act upon the officer so as to interfere with the exercise of that judgment, while the matter is properly before him for action. The reason for this is, that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine is therefore as applicable to the right of injunction as it is to the right of mandamus.

The principle discussed in the foregoing cases is one of power, and in all the cases that I have examined in which this question has been discussed, the courts have refused to grant such relief, on the ground of the want of power to interfere in any way, or that the court had no jurisdiction over such an officer, and in no case has the power of the court to interfere been admitted.

The same principle has been recognized by the court of appeals of this state. In the case of *People v. Canal Board* (55 N. Y. 390), the court says, "to the extent that public officers and public bodies are trustees, either of franchises or property for the benefit of the public, they are amenable to the jurisdiction of courts of equity in the administration of such trusts, at the suit of the people, if the people of the state at large are the *cestuis que trust*, or of the particular municipality interested, or of individuals having a special interest in the execution of the trusts, or in preventing the acts sought to be enjoined. . . ." A court of equity exercises its peculiar jurisdiction over public officers, to control their action, only to prevent a breach of trust affecting public franchises or some illegal act under color or claim of right affecting injuriously the property rights of individuals. A court of equity has, as

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such, no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made, coming within one of the acknowledged heads of equity jurisdiction."

In the case of *People v. Sturtevant* (9 N. Y. 263), relied on by the relator, the injunction restrained the board of aldermen from passing a resolution authorizing a railroad in Broadway. The court held, that the act passing the resolution was in the nature of a grant, and it was alleged there, that to carry out the grant would authorize a public nuisance; that a court of equity had jurisdiction in respect to public nuisances, or at any rate the question whether or not the act was an act of municipal legislation, was one that must be determined by the court; and that the court had jurisdiction of the parties to the action and of the subject matter of the action, and the injunction order was not void.

In *People v. Dwyer* (90 N. Y. 402), the court said, "whether the act sought to be enjoined was, or was not, of a legislative character, was a judicial question to be disposed of by the court acting upon the facts, and it could prohibit action until it could investigate and finally decide the question."

In each of the last two cases, facts were alleged tending to show that the defendants were, on behalf of the municipal corporation, about to do an act that would be illegal—in the *People v. Sturtevant*, to authorize a nuisance, and in *People v. Dwyer*, to commit a breach of trust;—but in the case at bar, no question was presented as to the character of the act sought to be enjoined. No right of property was involved, no damage to the plaintiff was alleged, no fact was alleged to bring the action within any of the heads of equity jurisdiction. The fact was alleged that an officer, on whom the constitution and the law had conferred power to do an act resting entirely within his discretion, had acted, or was about to act, from improper motives.

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The presentation of this fact gave the court no jurisdiction to act. The power to be exercised by the respondent was, as we have seen, one of the executive powers of the state, vested by the constitution and law in him. That power is entirely distinct from the judicial power vested in the courts. To hold that the judicial body could inquire into the motives of the executive in the exercise of the power conferred on him, and control him in the exercise of such power, would be to transfer the power from the executive in whom it is vested, to the judicial body.

On the presentation to the court of an affidavit that the governor of the state was about to make an appointment from corrupt or other illegal motives, would it be claimed for a moment that the court would have power to enjoin him from making such an appointment? Yet the act is not essentially different in that case, from the act of the mayor of the city of New York in the case at bar. Such acts are executive acts, vested by the organic law of the state in the officer appointed to perform them, and both are beyond the jurisdiction, power and control of the judicial power.

The relator claims that chapter 531, of the laws of 1881, gave the court jurisdiction to grant the injunction in this action. Section 1 of that act provides that, "all officers, agents, commissioners and other persons acting for and on behalf of any county, town, village or municipal corporation in this state, and each and every one of them, may be prosecuted, and an action or actions may be maintained against them to prevent any illegal official act on the part of such officers," &c. The actions authorized by this act, are limited to those against officers acting on behalf of a "county, town, village or municipal corporation." As before stated, the respondent, in making the appointments sought to be enjoined, did not act on behalf of the municipal corporation. No authority for the exercise of the jurisdiction claimed can therefore be claimed in the act of 1881.

I am of the opinion, therefore, that the court having

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no jurisdiction of the subject matter of the action, had no power to grant the injunction. The order was void, and the respondent was not in contempt.

The order appealed from should be reversed, with \$10 costs and disbursements, and the motion denied, with costs.

HERMAN FUCHS, RESPONDENT, v. THEODORE E. KOERNER, APPELLANT.

Master and servant.—Employee discharged without cause—duty as to accepting other employment.

An employee discharged without cause is only bound to accept suitable employment similar in kind.

Accordingly *held*, that an employment to sell fancy boxes on commission, is not similar in kind to an employment in the business of manufacturing essential oils and essences at a fixed salary.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 13, 1885.

Appeal from a judgment for \$871.72 in favor of the plaintiff, for damages and costs, entered on verdict of a jury.

The facts sufficiently appear in the opinion.

John D. Ahrens, attorney, and of counsel for appellant.

Simonson & Meyer, attorneys, and of counsel for respondent.

BY THE COURT.—O'GORMAN, J.—The plaintiff brought action against the defendant for breach of contract to hire the plaintiff, up to February 6, 1885, at a yearly salary of \$1,800, payable weekly, in the business of manufacturing essential oils and essences. Plaintiff was discharged, without sufficient cause, on June 6, 1884, and

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sued for damages. The amount of wages he would have earned up to February 6, 1885, was \$787.50.

Plaintiff, however, was bound to take other suitable employment, if he could get it; and it was in evidence that he was offered by the defendant, an employment, to *sell fancy boxes* for one Loder, on a commission of ten per cent. on the sales. This employment he refused.

The learned trial judge refused the request of defendant's counsel, to charge the jury that they should deduct from the said amount which plaintiff would be entitled to as damages, the amount he might have earned, and defendant also excepted to the charge that the plaintiff was bound to seek only employment of the same kind, and was not bound to accept the terms offered him by the defendant.

There was no error in these rulings. The plaintiff, in cases such as that at bar, is bound to reduce the damage by accepting, and holding himself ready to accept suitable employment, similar in kind to that in which he contracted to give his services to defendant. He is not bound to take any other and different employment which he may be offered (*Howard v. Daly*, 61 N. Y. 369; *Costigan v. Mohawk, &c. R. R.*, 2 Den. 609; *Shannon v. Comstock*, 21 Wend. 457).

The judgment must be affirmed, with costs.

SEDGWICK, Ch. J., and INGRAHAM, J., concurred.

Appellant's points.

WILLIAM PERZEL, APPELLANT, v. SINCLAIR TOUSEY, E. H. SPOONER AND SINCLAIR TOUSEY, AS PRESIDENT OF THE AMERICAN NEWS CO., RESPONDENTS.

Libel and slander—privilege of attorney and party in giving bill of particulars.—Bill of particulars—statements in become relevant and pertinent, as to question of privilege.

Prior to this action, an action of libel was brought against defendant Tousey, founded on a newspaper article, of and concerning the plaintiff therein (a woman), charging, among other things, that some one had been written to, to inquire if her children were illegitimate; and that he was instructed chiefly to ascertain if her character was decent; also "they" cast the stigma of bastardy on two innocent little children, and that she herself had become a certain man's mistress. Defendant Tousey, in his answer in that action, which was signed by defendant Spooner as his attorney, set up for a defense and in mitigation of damages, that the plaintiff therein was of bad character as to chastity, had frequented and been an inmate of a house of prostitution, and had lived with various men as a mistress. On motion of the plaintiff therein, and against the opposition of the defendant Tousey, he was ordered to serve on plaintiff a bill of particulars specifying the name or names of the individual or individuals whose mistress plaintiff was in the answer alleged to have been, with the date or dates of such alleged facts. In obedience to this order, a bill of particulars verified by defendant Tousey and signed by defendant Spooner, setting forth, among other individuals, that she became the mistress of this plaintiff in this action, in 1880, and was and continued, etc. This action for libel was brought, based on the allegation in the bill of particulars, and the facts above stated were set forth in the complaint.

Held, that malice could not be presumed from the compliance with the order for a bill of particulars; and that that order was an adjudication in the original action that the defense there interposed, of which the particulars were ordered, was relevant; and that, consequently, the allegations in the bill of particulars were privileged.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 13, 1885.

Appeal from a judgment entered on dismissal of the complaint at trial term on the pleadings.

 Appellant's points.

The facts appear in the opinion.

Stafford, Graff & Roman, attorneys, and *Marshall P. Stafford*, of counsel for appellant, argued: I. A libel is not privileged by the mere fact that a legal pleading was the medium of publication. Libelous words in a legal pleading are not privileged unless they are material and pertinent to questions involved in the suit (*Marsh v. Ellsworth*, 50 N. Y. 311; *Gilbert v. People*, 1 Den. 43; *Ring v. Wheeler*, 7 Cow. 730; *Hastings v. Lusk*, 22 Wend. 410).

II. The language complained of here was not material or pertinent as a plea in justification of the libel complained in the original suit. Six things are indispensably requisite to constitute a plea in justification of a libel. (1) Publication of the libel by the defendant must be admitted in direct and unqualified terms (*Anibal v. Hunter*, 6 How. 255; *Sayles v. Wooden*, *Ib.* 84; *Lewis v. Kendall*, *Ib.* 59; *Moak's Van Santvoord's Pl.* [3d Ed.] 572). (2) There must be a specific averment that the matters are alleged as justification. Every allegation must be taken as made in bar of the action, unless it is expressly stated to be alleged as justification or in mitigation of damages (*Fink v. Justh*, 14 Abb. N. S. 110; *Fry v. Bennett*, 5 Sandf. 75; *Mathews v. Beach*, *Ib.* 256; *Hagar v. Tibbets*, 2 Abb. N. S. 102; *Ayres v. Covill*, 18 Barb. 260; *Newman v. Otto*, 4 Sandf. 668; *Meyer v. Schultz*, *Ib.* 664; *Odgers on Libel*, 117; *Townsend on S. & L.* § 354). (3) The justification must be as broad and as extensive as the libel. Anything short of this will not do. There are no degrees of justification. It must be the whole or nothing (*Root v. King*, 7 Cow. 619; *Fry v. Bennett*, 5 Sandf. 69; *Odgers on Libel*, 177; *Townsend S. & L.* §§ 212, 355, 359). (4) It must cover and consist of the precise charge made in the libel. Something near it, or something of a similar nature, will not do (*Barthelemy v. The People*, 2 Hill, 257; *Andrews v. Vanduzer*, 11 Johns. 42; *Odgers on Libel*, 177-8; *Townsend S. & L.* §§ 212, 355). (5) The facts must be so stated as to show

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that the charge is true. An averment in general terms that it is true will not suffice. Concussions, inferences, rumors or arguments will not do. There must be such a clear, direct, plain statement of facts as to make it manifest that if the statements are true the libel was justified (*Fink v. Justh*, 10 *Abb. N. S.* 110; *Annibal v. Hunter*, 6 *How.* 255; *Sayles v. Wooden*, *Ib.* 84; *Wachter v. Quenzer*, 29 *N. Y.* 547; *Billings v. Walter*, 28 *How.* 97; *Tilson v. Clark*, 45 *Barb.* 178; *Maretzek v. Cauldwell*, 2 *Rob.* 715; *Townsend S. & L.* § 357; *Ogders on Libel*, 177-8). (6) It must appear that the justifying facts were known to the defendant at the time of publishing the libel (*Bush v. Prosser*, 11 *N. Y.* 360; *Fry v. Bennett*, 5 *Sandf.* 69; *Root v. King*, 7 *Cow.* 619). These rules are not changed by the provisions (*Code*, § 535), as to mitigation and justification (*Bush v. Prosser*, 11 *N. Y.* 349; *Bisby v. Shaw*, 12 *Ib.* 66); and as to the effect of attempting and failing to prove justification (*Spencer v. Keeler*, 51 *N. Y.* 535; *Distin v. Rose*, 69 *Ib.* 127).

There is nothing in the original suit that meets a single one of these six indispensable requisites of a plea in justification of the libel complained of in that suit.

III. The language complained of here was not material or pertinent in mitigation of damages in the action in which they were used. There are but two general ways in which a defendant in a libel suit can possibly mitigate damages. One by showing there was no notice, because facts known at the time of publishing the libel induced a belief that the charge was probably true. The other by showing that plaintiff's general reputation on the subject to which the libel relates was bad. (a.) The words complained of here could not be material or pertinent on the question of malice to reduce punitive damages; because there is no allegation that the facts which they charge were known at the time of publishing the original libel, and so induced a belief that it was true (*Bush v. Prosser*, 11 *N. Y.* 360). (b.) The words here complained of could not be material or pertinent in mitigation of damages to

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reputation. Damage to reputation can be mitigated only by proving that the plaintiff's reputation was bad in the particular respect to which the libel pointed (*Root v. King*, 7 *Cow.* 629). But bad reputation, in general or in any particular respect, can be proved only in general terms, that is, by asking what is the general reputation as to any trait or moral quality. Specific acts of misconduct can never be proved to establish bad reputation (1 *Greenleaf's Ev.* §§ 25, 27, 55, 424-426 ; *Odgers on Libel*, 305 ; *Hatfield v. Lasher*, 81 *N. Y.* 250). The reason of this rule is that the question or inquiry is, not as to character in fact, but as to reputation. The two things are entirely distinct.

IV. The language here complained of was wholly impertinent and immaterial to any issue of the case in which it was uttered. By the authorities cited under the first point, therefore, the libelous allegation of which this plaintiff complains was not privileged, and all who were concerned in its publication are liable to an action therefor.

V. The fact that the libelous allegation is found in a bill of particulars served under an order of court is immaterial. (a.) The order was an alternative one. It did not compel defendants to serve a bill of particulars. They were at liberty not to serve it, and a failure to do so would only have precluded them from giving proof in support of an allegation which was itself immaterial. The order directed particulars of the allegation that plaintiff had been the mistress of "various men." This allegation of "various men" was itself totally irrelevant for the same reasons that the language complained of was irrelevant. It was not pertinent as a plea either in justification or mitigation of the charge that the plaintiff "had become a certain man's mistress." The order of the court was, in effect, that if defendants desired to attempt to prove this immaterial allegation, they must furnish a bill of particulars. Parties to an action must always take the responsibility of their own pleadings. They cannot shift that responsibility upon the court, which always presumes

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that the allegations to be made under its order will be pertinent and material, and not recklessly libelous. Even if an order of court could shield a libelous allegation under any circumstances, an order which leaves a party the alternative of making the allegation or not, cannot have such effect. The responsibility of exercising the option rests upon the party who selects. (b.) In asking that defendants be compelled to give particulars of the charge as to "various men" or else be precluded from giving proof under it, plaintiff, in the original action, proceeded in the regular and only proper way for the protection of her rights. The step was designed either to have the allegation abandoned as irrelevant, or else get facts which would enable plaintiff to know what it meant, and prepare to meet it. This is the practice allowed and commended by this court (*Dowdney v. Volkening*, 37 *Super. Ct.* 313).

E. H. Spooner, attorney, and *William Fullerton*, of counsel for respondents, argued :—I. If the allegation in the bill of particulars, on which this present action is brought, was properly pleaded, and was material and pertinent in said former action, then it was privileged, and the complaint herein was properly dismissed (*Carr v. Selden*, 4 *N. Y.* 91; *Marsh v. Elsworth*, 1 *Sweeny*, 589; affirmed, 50 *N. Y.* 310; *White v. Carroll*, 42 *Ib.* 16).

II. The allegation, which is the subject of this action, was also pertinent and material, and well pleaded in mitigation or reduction of damages as to every part of the original libel which related to plaintiff's chastity (*Wharton's Law of Ev.* § 51, vol. 1; *Bush v. Prosser*, 11 *N. Y.* 347; *Kniffin v. McConnell*, 30 *Ib.* 285; *Verny v. Watkins*, 7 *Cox & P.* 308; *Wendell v. Edwards*, 25 *Hun.* 498; *Johnson v. Calkins*, 1 *John. Cas.* 116; *Willard v. Stone*, 7 *Cow.* 22; *Palmer v. Andrews*, 7 *Wend.* 142; *Boynnton v. Kellogg*, 3 *Mass.* 189; § 536 *Code*). It is certain that the words "or otherwise" inserted in section 536 *Code* Civil Procedure, on changing section 165 of the *Code*, were

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introduced for a purpose, and in seeking therefor, we find that a rational meaning and purpose can only be found on the theory that the legislature used the word "mitigate" in the phrase "tending to mitigate" in a limited sense, and intended thereby to cover such defenses only as bear on the question of defendant's malice; and intended by the words "or otherwise" to include and authorize all other partial defenses which will have the effect to reduce damages; and among which are included the partial defense that plaintiff's general character is bad; the partial defenses in cases for breach of promise of marriage and for a seduction, approved by the cases before cited, and such a partial defense as was made by the defendant in the original action of *Prescott v. The American News Company*, and on which this present action is brought.

III. An action of libel will only lie on a pleading, because of gross and palpable errors therein. If there be any doubt as to the correctness of the views presented under the first and second points of this brief, then defendants rely with entire confidence on the doctrine laid down in the case of *Warner v. Paine* (2 *Sand.* 195). In *Bradner v. Faulkner* (93 *N. Y.* 515), it was held that "the rules by which the sufficiency of pleading is ordinarily determined,—i. e., relevancy and materiality, may not be strictly applied to allegations in an answer of facts by way of mitigation," and that "the borderline between such facts as are properly receivable in mitigation, and those which are inadmissible for such purposes cannot with accuracy be defined preliminarily to the trial." As to what would have been such a "gross and palpable" error in defendant's pleading in the original action that a suit for libel would lie thereon, defendants herein conceive that if the third defense in that action had charged the plaintiff Prescott with being guilty of larceny, or had charged her with any other fault or crime, having no relation to the subject of her chastity, such charges might have been deemed gross and palpable errors

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in pleading. But defendant in the original action made no such charges, either in the third defense, or in the supplemental answer, or in the bill of particulars.

IV. It is not necessary that the facts contained in all partial defenses should be known to defendant at the time of the publication of the libel. That is the case only where mitigation is asked for upon facts showing an absence of malice on the part of defendant; as was the case in *Bush v. Prosser* (11 N. Y. 347), and in *Hartfield v. Lasher* (81 *Id.* 246). But the partial defenses in mitigation, which a defendant may make, are not confined to such as have the effect to show an absence of malice on his part. There are several which have no such effect, among which may be mentioned the partial defense that plaintiff's general character is bad, the partial defense in actions for breach of promise of marriage, and for seduction, that plaintiff has been guilty of specific acts of unchastity, and defendants claim that among them is also included the partial defense in mitigation of damages, that defendant, in the original action of *Prescott v. Tousey*, made, namely, that plaintiff was guilty of various acts of unchastity. But the allegations were pleaded for the purpose of mitigating or reducing plaintiff's damages by showing that she was an unchaste woman, and, therefore, not entitled to the same damages in an action brought by her on charges affecting her chastity, that she would be if she were virtuous; the authority therefor being the words, "or otherwise" in section 536 of the Code, and the cases above cited. It is obvious that defendant's right to plead such facts, for the purpose of reducing damages, can no more depend on the facts having been known to them at the time of the publication of the libel, than would their right to plead plaintiff's general bad character for the same purpose depend on their having known the same to be bad at the time of the publication of the libel.

V. If the allegation in the third defense in the original action, that "she lived with various men in the city of

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New York and elsewhere as a mistress," was not material, yet plaintiff, by obtaining a bill of particulars of the same, made both it and the bill of particulars material. It often happens in practice that an immaterial allegation is made material by the manner in which the opposite party to the action deals with it. The interpretation of the plaintiff's act in moving for the bill of particulars was, that the original allegation in the third defense was good as far as it went, but that it did not go far enough. The result of this request or application to the court was the order compelling the defendant to put into his bill of particulars the very allegation now sued on in this present action. And defendant had a right to put such allegation into his bill of particulars as being material and proper ; plaintiff having elected to treat as material the allegation in the third defense, of which the allegation in the bill of particulars was an amplification—it being necessary to serve the allegation in the bill of particulars that defendant might preserve, under the order of the court, the right to litigate the said allegation in the third defense. The allegation in the answer having been treated by the parties to the action as relevant and material, it does not lie in the mouth of a stranger to the action, such as the plaintiff in this action was, to allege the contrary.

BY THE COURT.—INGRAHAM, J.—The complaint in this action alleges :—

That one Marie Prescott commenced an action against the defendant, Sinclair Tousey, as president of the American News Company, for libel, founded on a publication in a certain newspaper, and set forth the publication, the material portion of which, so far as this action is concerned, is as follows : "He had written an article for the D. News, and he then showed it to her. She said it would be fearfully damaging to you. She implored him not to send the article. He said, that if you hadn't some friend who would stop it, you were a ruined woman, for he had been already written to, to inquire if your children were

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illegitimate, and what he was instructed chiefly to ascertain was if your character was decent. No friend with the needful coming forward, they cast the uneradicable stigma of bastardy on two innocent and helpless little children, left broken-hearted the actress mother, and recorded of the woman herself, who was then struggling hard to support all three, that she had become a certain man's mistress."

That in the answer to the complaint in that action the defendant alleged as follows: Third defense. "For a further and third defense to said amended complaint, and in mitigation of damages, the defendant alleges on information and belief that at the time of the publication in said newspaper, called Nym Crinkle, of the article contained in said amended complaint, plaintiff was, and for a long time prior thereto had been, a woman of bad character as to chastity, and was an unchaste woman, and had frequented and been an inmate of a house of prostitution in the city of New York and elsewhere, and that she had lived with various men in the city of New York and elsewhere as a mistress."

That subsequently, on motion of the plaintiff in said action, and on opposition of the defendant, an order was entered, whereby it was ordered "that within five days after service of this order upon the defendant, said defendant serve upon the plaintiff a bill of particulars of a part of the third defense contained in the defendant's answer herein, specifying . . . the name or names of the individual or individuals whose mistress plaintiff is therein alleged to have been, together with the date or dates of such alleged fact."

That in compliance with said order, the defendant in said action served a bill of particulars, wherein it is alleged as follows: "That plaintiff became the mistress of William Perzel in the year 1880, and was and continued to be his mistress during the months of October, November and December, 1880, and ever since has continued to be and now is his mistress."

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The original action was founded on the article published in "Nym Crinkle," a newspaper published in the city of New York, of the issue of August 6, 1881. The answer and the bill of particulars in said action, were signed by the defendant Spooner as attorney for the defendants therein, and verified by the defendant Tousey.

This action is brought to recover for a libel upon the plaintiff contained in the statement of the bill of particulars above set forth. The case came on for trial before a jury, and on the opening of the case on motion of the defendant, the court dismissed the complaint, and from the judgment entered on such dismissal, plaintiff appeals.

The law is well settled that a party, and his attorney and counsel, conducting a judicial proceeding are privileged in respect to words or writing used in the course of such proceeding reflecting injuriously on others, when such words and writing are material and pertinent to the question involved, and that within such limits the protection is complete, irrespective of the motive with which they are used (*Marshal v. Elsworth*, 50 N. Y. 309); and malice cannot be predicated on what is so stated or written.

"Where the matter is put forth by a party or his attorney or counsel, in the course of the proceeding, which may possibly be pertinent, the court should not and will not feel disposed so to regard it as to deprive its author of his privilege and protection. Where it is fairly debatable whether the matter is relevant, we are inclined to give the counsel or the party using the words the benefit of the doubt which may fairly exist as to its pertinency" (*Warner v. Paine*, 2 *Sandf.* 201). And where a party or his counsel in the course of a judicial proceeding, used the words complained of in good faith, supposing them to be pertinent and without malice or any intention of slandering or libeling the plaintiff, the defendant is protected (*Warner v. Paine*, *supra*; *Hastings v. Lusks*, 22 *Wend.* 409).

In order, therefore, to sustain the dismissal of the complaint in this action, it must appear from the complaint itself that the words complained of were written in the

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course of a judicial proceeding, and were relevant and pertinent to the matter in question, or that the defendant used them in good faith, supposing them to be pertinent and without malice.

That the words complained of were used in the course of a judicial proceeding is admitted, but it is claimed by the plaintiff that they were not pertinent to the controversy.

The third defense in the original answer does not attempt to allege particular facts. It says that the plaintiff was, and for a long time prior thereto had been, a woman of bad character as to chastity, and that she had lived with various men in the city of New York and elsewhere as a mistress. The defendant for his defense rested with that allegation. He did not allege in his answer that the plaintiff in that action was the mistress of the plaintiff here, or any particular fact that could be relied on upon the trial to mitigate the damages.

As the allegation in the original answer stood, plaintiff in this action would have suffered no damage, and under the rule laid down in *Hatfield v. Lasher* (81 N. Y. 246), particular facts could not have been proven, at any rate without evidence that such facts were known to the defendant at the time of the publication of the original libel.

The plaintiff in that action, however, on application to the court, and notwithstanding the opposition of the defendant, obtained an order compelling the defendant to specify the name or names of the individual or individuals whose mistress plaintiff is alleged in the answer to have been. For that order the defendants are not responsible. It was made against their objection, and they were bound to comply with its terms, and for a failure to comply therewith the court had power to strike out the answer (*Gross v. Clark*, 87 N. Y. 272).

Can words written which are necessary to comply with the terms of such an order be malicious, or can malice be predicted of what is so written? I think not.

Statement of the Case.

The service of the bill of particulars was not for the benefit of the defendant in that action. It did not aid his defense, but was required by the court for the protection of the plaintiff there. It was given under compulsion, and every presumption of malice which the law implies from written or spoken words, is rebutted by the existence of such facts.

Nor can the allegation in the bill of particulars be considered irrelevant. The order granting the bill of particulars was an adjudication in that suit that the defense was relevant, and that for plaintiff's protection the particulars of the defense must be specified.

Under all the circumstances, I am of the opinion that the allegations of the bill of particulars were privileged, and the judgment should be affirmed, with costs.

O'GORMAN, J., concurred.

LEANDER K. BINGHAM, ET AL., v. OSCAR J. MAIGNE.

Restraint of trade—limit as to space, etc.—contract restraining journeyman or apprentice from practice of trade.

The plaintiffs, who were manufacturers of printers' rollers and composition, bought out a firm in the same business, who, through the combined skill of defendant and a fellow-workman, had become important rivals and competitors, and at the same time plaintiffs induced the competing firm to get from each of these workmen an agreement, stated to be on a good and valuable consideration, not to exercise their trade thereafter "either in the city of New York or within a radius of 250 miles therefrom, so long as plaintiffs, their survivors or successors, shall continue such business or manufacture." In this action to restrain defendant, one of said workmen, from violating the agreement,

Held, That though a contract in partial restraint of trade, restricting it within certain reasonable limits or times, and confining it to particular persons, is valid if founded upon a good and valuable consideration, the contract in this case is clearly unreasonable as to space, and is also

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against the spirit, if not the letter, of the state statute, making it unlawful to accept from any journeyman or apprentice any contract that he shall not set up his trade in any particular place.

Before FREEDMAN, J., at Special Term.

Decided May 2, 1885.

Motion for a dismissal of the complaint after trial at special term.

The action was for an injunction.

The facts appear in the opinion.

W. R. Spooner, for plaintiffs.

E. B. Cowles, for defendant.

FREEDMAN, J.—On or about August 17, 1882, the plaintiff's firm, Bingham, Daley & O'Hara, manufacturers of printers' rollers and composition, agreed to purchase, and did purchase, the business of a rival firm, named W. H. H. Rogers & Co., inclusive of the stock, machinery, assets, contracts and good-will of the last named business. One of the terms of the purchase was that Rogers & Co. should procure the defendant, one of their employees, and as such having knowledge of some secrets relating to, and possessing skill in the manufacture of printers' rollers and composition, to execute, and the said defendant did execute to the plaintiffs an agreement, whereby he bound himself, that he would "not engage, directly or indirectly, as principal, agent or employee, or in any capacity, either alone or in connection with any person or persons, individually, or in any firm, association or corporation, or in any manner have to do with the business or manufacture of printers' rollers and composition, or in any wise assist, support or promote any other person or persons, firm, association or corporation in such business or manufacture, or allow such business or manufacture to be in any wise carried on, in or in connection with any establishment, which I may have to do with and be able to control, either in the city of New York, or at any point within a

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radius of two hundred and fifty miles therefrom, so long as said Bingham, Daley & O'Hara, their survivor, survivors or successors, shall continue in such business or manufacture." The agreement expressed the receipt of a "good, valuable and sufficient consideration" from Rogers & Co., and the receipt of one dollar from the plaintiffs.

The action is brought to restrain the defendant from violating the said agreement. All claim for damages having been waived, and there being no controversy as to the facts as stated, the right of the plaintiffs to injunctive relief depends upon the validity of the agreement sought to be enforced, and the presentation of a sufficient equity calling for its enforcement.

The defendant denies the existence of a sufficient equity, and insists that the agreement is invalid (1), because, upon its face, it is in restraint of trade; and (2), because, in substance, it is against the statute law of this state.

At common law, persons competent to contract are free to make their contracts to suit themselves, and the law does not restrict them except to prevent injury to the public. But any contract, although not expressly prohibited by positive law, which, in its operation, would injure the public, or which contravenes any established interests of society, or conflicts with the morals of the times, is void. The promotion of the public welfare is the first consideration of the law. That contracts in restraint of trade, which embrace the entire kingdom or state, are void, is a doctrine coeval with the common law. It is said to have sprung from the English law of apprenticeship (2 *Parsons Contr.* 7th ed. 751). It was also a principle of the Roman law (*Puff.* lib. 5, c. 2, §§ 3, 21 H. VII. 20, cited in *Mitchel v. Reynolds*, 1 *Smith's L. C.* 709; S. C., 1 *P. Wms.* 181).

The reasons for the rule are stated by SELDEN, J., in *Lawrence v. Kidder* (10 *Barb.* 641), to be as follows, viz: "The welfare of a state is advanced by the increase of its productive industry. It is important, therefore, that each

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of its citizens should be free to employ himself in that department of labor in which his personal efforts will be likely to add most to the aggregate productions of the country. This is the first and leading reason for the rule in question. But there is another. The convenience of the public requires that all the various trades and employments of society should be pursued each in its due proportion—a result with which the exclusion of any individual from his accustomed pursuits has a tendency to interfere.” Originally, the rule was that all contracts in restraint of trade, though limited in their operation, were void. And especially if the restraint was general and unlimited in respect to space, the contract was absolutely void, no matter how much it was limited in respect to time. As civilization advanced, commerce extended, and the social conditions changed, the rule became less stringent. The modern rule is that a contract in partial restraint of trade, restricting it within certain reasonable limits or times, or confining it to particular persons, is valid, if founded upon a good and valuable consideration, and the test of the reasonableness of any restriction is, whether it is such as only affords a fair protection to the party in whose favor it is made, and at the same time does not militate against the public interest (*Dunlop v. Gregory*, 10 N. Y. 241; *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 *Super. Ct.* 442, and cases there cited). But the reasonableness must be made to appear. Nothing will be presumed in favor of such a contract. It is presumptively void, and the reasons and the facts which render it valid, must be shown by the party seeking to enforce it (*Ross v. Sadgbeer*, 21 *Wend.* 166).

In the case at bar the contract is clearly unreasonable as to space. The space covered by the contract includes about three-fourths, if not nine-tenths, of the territory of the state of New York, the entire states of Connecticut, Rhode Island, Massachusetts, New Jersey and Delaware, and portions of the states of Vermont, New Hampshire, Maine, Pennsylvania, Maryland and Virginia.

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That the contract would be void beyond doubt in the states entirely covered by it, has been impliedly conceded by the plaintiffs, but they insist that this is not a matter of which the courts of New York will take cognizance, as long as they, the plaintiffs, are willing to confine themselves to the enforcement of the contract within the territorial limits of New York ; and they consequently pray for only an injunction embracing those parts of this state which are covered by the contract. Under the decisions of *Saratoga Co. Bank v. King* (44 N. Y. 87), and *Arnot v. Pittston & Elmira Coal Co.* (68 N. Y. 558), it may be a question whether the point thus taken by the plaintiffs is tenable. But it is not necessary to determine it, for the contract covers too large a territory even in the state of New York.

The restraint practically embraces almost the entire state, for out of sixty counties it leaves to the defendant only the comparatively insignificant ones of Niagara, Orleans, Genesee, Erie, Wyoming, Chautauqua and Cattaraugus, and parts of the counties of Monroe, St. Lawrence, Franklin, Clinton, Livingston, Jefferson and Allegany, and out of all the important cities, it leaves to the defendant only Rochester and Buffalo. Upon this point, therefore, the case is fully covered by the decision in *Lawrence v. Kidder* (10 Barb. 641), in which case the restraint extended to the territory of the state west of Albany, and the decision of *Homer v. Graves* (7 Bing. 735), in which case the agreement was that a dentist would abstain from practicing his profession within one hundred miles of the city of New York.

The contract is also against the spirit, if not the letter, of the statute of this state, which provides as follows, viz: "No person shall accept from any journeyman or apprentice any contract or agreement, nor cause him to be bound by oath or otherwise, that after his term of service expired such journeyman or apprentice shall not set up his trade, profession or employment, in any particular

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place, shop, house or cellar, &c." (III. R. S. 6th ed. p. 180, § 51 [§ 39], 7th ed. Vol. III. p. 2353, § 39).

The statute, as will be seen, applies not merely to employers, but to *every person*, and the next section imposes a penalty upon "every person accepting such agreement." The defendant was what Mr. Bingham, one of the plaintiffs, in his testimony, called "a journeyman roller-maker," in the roller factory of Rogers & Co., and this admission is sufficient for the purposes of this action, in which the plaintiffs invoke the powers of a court of equity, even if under a prosecution under the statute it were necessary to show that the defendant regularly learned the trade of roller-making, &c., as an apprentice, and in due course of time became a journeyman. For present purposes, it is quite sufficient to treat the statute as a re-enactment of the common law doctrine relating to contracts in restraint of trade made by apprentices or journeymen.

The considerations so far stated increase in force when the plaintiff's case is considered as a whole. The business of the plaintiffs' firm consists in manufacturing printers' rollers, and a composition with which they are covered. In that business they are liable to competition from other firms. Each firm, including that of plaintiffs, has its own processes concerning the use of certain materials and the proportions in which they are used, and each claims superiority for its own products in consequence of the processes employed. The plaintiffs concede that there is nothing about their processes which was, or can be patented, and that there are other firms which know of such processes. One, Jonas R. Cole, while employed by the plaintiffs, became acquainted with the processes of the plaintiffs, and, upon being discharged, he entered the employ of Rogers & Co. The defendant then was in the employ of Rogers & Co., and in that he subsequently acquired the knowledge which Cole had. In the course of time, both Cole and the defendant became quite skilled in the manufacture of rollers and the composition with

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which they were to be covered, and their combined skill gave importance to Rogers & Co., as rivals and competitors of the plaintiffs. To overcome this rivalry and competition, the plaintiffs bought out Rogers & Co., but, instead of taking Cole and the defendant into their employ, they induced Rogers & Co. to get from each of them an agreement not to exercise their trade thereafter. For all that appears, it is the only trade from which either of them can gain a livelihood. On the other hand, there is no evidence that the facilities of the plaintiffs for supplying all the demands of the entire trade are sufficient for the territory covered by the contract, nor is there any evidence of an adequate consideration beyond what appears upon the face of the instrument. As nothing is presumed in favor of a contract of this kind, and the burden of showing the reasons and the facts making it valid, rests upon the party seeking to enforce it, the plaintiffs have failed to make out a case which calls for the interference of a court of equity. Whatever reasons may exist in favor of a contract between vendor and vendee, or between partners agreeing upon a dissolution, whereby the good-will of a business purchased, or taken and accepted as a valuable part of the business, is protected against subsequent acts of the vendor or the retiring partner in derogation of the sale or the settlement, or which may be urged in favor of patented inventions, have no application to the case at bar, which is the case of an employee who is sought to be condemned to idleness so long as the plaintiffs and their survivors or successors shall continue in the business, which would practically prohibit the defendant forever. To enforce such a contract would make the individual as well as the public suffer injury, for the capacity of an individual to produce is not only a source of gaining a livelihood for himself, but constitutes his value to the public.

The complaint must be dismissed, with costs.

Statement of the Case.

THE METROPOLITAN CONCERT CO. (LIMITED), APPELLANT, v. HENRY E. ABBEY AND EDWARD G. GILMORE, RESPONDENTS.

Res adjudicata—when judgment is not.—Corporation organized under chapter 611, laws 1875—leases by.—*Ultra vires*—imperative necessity—burden of proof of.

When a question is not in issue on the pleadings, and would not have been available as a defense if it had been in issue, a judgment in the action against the defendant will not be *res adjudicata* on that question in a subsequent action when it is in issue and is available as a defense.

Thus where an action was brought by a corporation lessor against the lessee for the rent reserved by the lease, which fell due during the lessee's actual occupancy, and the question of the invalidity of the lease was not in issue on the pleadings, and judgment went against defendant, *Held*, in a subsequent action to recover rent for a period ensuing the lessee's abandoning the occupancy, in which the invalidity of the lease was raised on the pleadings, that the former judgment was not *res adjudicata* on the question of the validity of the lease, since it was not in issue in the first action, and even if it had been pleaded therein, it would not have been available as a defense thereto, whereas in the second action, the invalidity was pleaded, and such invalidity constituted a defense.

The power to sell and convey, given by § 2, chapter 611 of the laws of 1875, to corporations organized under it, does not include a power to lease, therefore—as by § 3 of Part I. R. S., chap. 18, title 3, no corporation can possess or exercise any corporate power except such as shall be necessary to the powers granted—the making of a lease by such a corporation, of all its property, unless it be by reason of imperative necessity, is *ultra vires*, and the lease is void. In such a case, it rests on the corporation to show the imperative necessity.

In the case at bar, plaintiff corporation, being the lessee of certain premises, made a sublease to defendant. *Held*, that in absence of proof by plaintiff that the premises could not be disposed of except by way of lease, the sublease was void. *Held further*, the business of plaintiff being to give musical entertainments, and the sublease being of the only property it possessed, and it not having given any musical entertainments or performed any legitimate corporate act for some years, that evidence as to reasons for ceasing to give entertainments was immaterial and irrelevant.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided May 18, 1885.

Appellant's points.

Appeals from two judgments entered on the report of a referee, dismissing the plaintiff's complaints.

The facts appear in the opinion.

Davenport & Leeds, attorneys, and *John S. Davenport*, of counsel for appellant, argued :—I. The power to sublet is necessary to the exercise of the business power of the corporation. A business corporation must, of necessity, do a vast variety of acts, any one of which, if done by it repeatedly, and as a business, would be in violation of its charter and in excess of its powers. If a man were charged with the conduct of carrying on a concert business, with the general statement that he had all the authority necessary to carry on that business and no other, and he were to hire a hall at a rent which proved ruinous for that business, he could not excuse himself from a charge of willful neglect if he stopped the business, left the hall idle and simply wasted the capital in paying the rent, instead of subletting the hall and hiring a cheaper one, on the ground that his principal had given him no authority to do such an act ; and no more could these directors, if they had not sublet. The ruling that the sublease in this case is *ultra vires*, produces substantially the above result. It says to the directors, you had no power to do anything but pay the rent, if you could not sell the lease, and yet you had power to do anything necessary to carry on the business. There is nothing in the facts, in the statute, or in any decision cited, to mark an isolated act of subletting an unnecessary hall as distinct from any other of the thousand and one unclassified acts which any business corporation may find it necessary to do. For example, the corporation might employ a musical director for five years, and finding him too high-priced, agree to sublet him to some one who would pay the major part of his salary. Would it not be absurd to say that such an act was not necessary to the "exercise of the power to carry on its business?"

II. The presumption is that the corporation was acting

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legally. Assuming that subletting has nothing mysterious about it to distinguish it from any other of the innumerable acts which a business corporation may be able to do, this judgment can only be sustained on the theory that when a corporation does one of those acts, it is presumptively violating the law. If this is correct, the position of a director in such a corporation is such that no responsible man could accept it. He must, every day, do a vast number of things under the general power of what is necessary. He must, because it would be negligence not to. But he must also take the risk of their being necessary, and must always be ready with sufficient evidence of the environment of the act, or be held guilty of a breach of trust. He is put, also, in the position, utterly unknown to our law in all other cases, of being required to act, and yet on the one hand without the protection of the usual presumption that a man acts legally, and on the other of having the existence of facts presumed in order to charge him with illegality; namely, if the directors sublet the hall, which hall, as found by the referee, was not necessary to the general business of the corporation, the law will presume that they could have sold the lease, or that they could have gone on and done business profitably in the hall; that they could have profitably and properly exercised their powers under that specific lease. The proposition that the law will accept such violent presumptions of fact, and on those presumptions call upon a man to prove himself not guilty, is astounding. On the other hand, the presumption that an act which might be necessary under certain circumstances, if done, was done in good faith, and under such circumstances as not to be illegal, is a mere refusal to presume that the directors committed a breach of trust. There is no authority to the contrary, and we cite several directly in point (*Farmers' L. & T. Co. v. Clowes*, 3 N. Y. 470; *Chatauqua Co. Bank v. Risley*, 49 *Ib.* 381; *De Groff v. Am. Lin. Thread Co.*, 21 *Ib.* 124; *Farmers' Loan & Trust Co. v. Curtis*, 7 *Ib.* 466).

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III. The permission to sell is not a prohibition to lease. The statute says, "may sell and convey." Further on it says, with regard to property taken for a debt, "must sell within three years unless allowed a longer time by the court." Clearly the mandatory character of the second provision indicates the purely permissive character of the first; otherwise, there is no reason for it. Therefore the statute cannot be construed to mean that a corporation must immediately sell unutilized property, and cannot be permitted to lease it if the best judgment requires it. If it does, then such a corporation must always sell its property, with notice to the buyer that it cannot hold it for a better market without great loss, because it may not lease it.

IV. The referee presumes the lease unnecessary, and refuses to allow evidence against the presumption. The referee excluded the question, "Can you state any reason for the company's ceasing to give entertainments in this particular hall?" If the burden is with the plaintiff to show the facts justifying this special act, that question is clearly calculated to call out a fact showing it. The answer might have been, "the hall is expensive, or ill adapted," or "we determined to go elsewhere to another city." Thus we are neither allowed to presume that the act is right, nor to take up the burden of showing that it is not wrong. Certainly, we must be allowed one or the other of these rights, or else the court must hold that under no circumstances whatever can a business corporation sublet property which it has hired by mistake, if the judgment is to stand.

V. Statutes like this have been repeatedly construed with liberality rather than hamper such corporations (*Brown v. The Winisimet Co.*, 11 *Allen*, 326; *Simpson v. The Westminster P. H. Co.*, *H. L. C.* 712; *Barry v. The Merchants' Ex.*, 1 *Sandf. Ch.* 280; *Matter Howe*, 1 *Paige*, 214; *Old Colony R. R. v. Evans*, 6 *Gray*, 25; *Carpenter v. The B. H. G. M. Co.*, 65 *N. Y.* 48). The referee dismisses these cases with the remark that it appeared there

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that they were only "temporary." We submit this is a mistake. No case is cited forbidding a sub-lease under any or all circumstances.

VII. The question of *ultra vires*, depending thus upon the fact whether the lease was necessary to the carrying of the plaintiff's business, it is *res adjudicata* in the two actions where rent was recovered, for it appears by the findings that in one of those actions the defendants abandoned the possession of the premises before they put in their answer, and being out of possession, they were not prevented from pleading the defense of *ultra vires*. The issue of the validity of the lease was tendered to them on all grounds, and failing to take issue when they might have done so, they are precluded from questioning the validity of that judgment, and setting up any defense which calls in question the correctness of its conclusions. We find the rule as to former adjudication stated in the following cases (*Mallory v. Horan*, 49 N. Y. 11; *Tuska v. O'Brien*, 68 *Ib.* 446; *White v. Merritt*, 7 *Ib.* 352). A failure to set up a defense does not prevent its adjudication inferentially (*Davis v. Talcott*, 12 N. Y. 184). Further, even if they had not been out of possession, they still could have surrendered possession before pleading, so that their neglect to set up the defense was, in either case, voluntary.

George L. Rives, attorney, and of counsel for respondent Abbey; *A. J. Dittenhoefer*, attorney, and of counsel for respondent Gilman, argued:—I. The defendants are not concluded by the judgments in actions 1 and 2 (*Duchess of Kingston's Case*, 2 *Smith's L. C.* 784; *Packet Co. v. Sickles*, 9 *Wall.* 592; *Aurora City v. West*, 7 *Wall.* 106; *Vaughan v. O'Brien*, 39 *How. Pr.* 519; *Palmer v. Hussey*, 87 N. Y. 303; *Dawley v. Brown*, 79 *Ib.* 390; *Masten v. Olcott*, 22 *Hun.* 587; *Goucher v. Clayton*, 11 *Jur. N. S.* 107; *Russell v. Place*, 94 U. S. 606; *Mason's Executors v. Alston*, 9 N. Y. 28; *Campbell v. Butts*, 3 *Ib.* 173; *Davis v. Talcott*, 12 *Ib.* 184; *Campbell v. Consalus*,

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25 *Ib.* 613 ; *Burdick v. Post*, 12 *Barb.* 168 ; 6 *N. Y.* 522 ; *Ferguson v. Mass. Mutual Life Ins. Co.*, 22 *Hun.* 320 ; *Schwinger v. Raymond*, 83 *N. Y.* 192 ; *Cromwell v. County of Sac*, 94 *U. S.* 351 ; *Howlett v. Tarte*, 10 *C. B. [N. S.]* 813 ; *Stowell v. Chamberlain*, 60 *N. Y.* 272 ; *Van Alstyne v. I. P. & C. R. R. Co.*, 34 *Barb.* 28 ; *Weed v. Burt*, 78 *N. Y.* 191 ; *Perry v. Dickinson*, 85 *Ib.* 354). The cases of *Ballenjie v. Cragin*, 31 *Barb.* 534 ; *Blair v. Bartlett*, 75 *N. Y.* 150 ; *Newton v. Hook*, 48 *Ib.* 676 ; *Embury v. Conner*, 3 *Ib.* 511, 522 ; *Jordan v. Van Eppes*, 85 *Ib.* 427 ; *Tysen v. Tompkins*, 10 *Daly*, 244, commented on.

The plaintiff's counsel on the trial attempted to make a distinction, which does not seem to be based on any reported case, between defenses which do and defenses which do not involve the validity of a contract. This theory appears to rest upon an entire misconception of the law of *res adjudicata*, and is distinctly contrary to the cases of *Goucher v. Clayton*, and *Cromwell v. County of Sac*, and has been repudiated by this court in *Hughes v. Alexander* (5 *Duer*, 488).

II. The agreement of September 27, 1881, is *ultra vires* of the plaintiff corporation. It was so under its charter powers (Chap. 611, laws 1875, § 2, subd. 6 ; *Ashbury Co. v. Riche*, 7 *H. L.* 653 ; *Thomas v. Railroad Co.*, 101 *U. S.* 71 ; *Russell v. Topping*, 5 *McLean*, 194 ; *Pacific R. R. Co. v. Seeley*, 5 *Mo.* 212). It is true that it has been frequently held that where a corporation possesses land or other property, and does not need the whole of such property in its business at any particular time, it may temporarily lease the property thus unemployed. It is in all such cases essential that the use so made should be merely temporary and strictly incidental to the principal business of the company (*Brown v. Winimisset Co.*, 11 *Allen*, 326 ; *Forrest v. Manchester, &c. Ry. Co.*, 30 *Beav.* 40 ; *Simpson v. W. P. Hotel Co.*, 8 *H. L. Cas.* 712). This rule would apply to the case at bar if the lease in question had been of one room in the building or of the restaurant.

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The agreement was *ultra vires* under general rules of laws (Thomas v. Railroad Company, 101 U. S. 71; Black v. Del. & R. Canal Co., 22 N. J. Eq. 130; Atlantic & Pacific Co. v. Union Pac. Co., 1 McCrary Rep. 641; N. Y. Firemen's Co. v. Ely, 5 Conn. 573; 1 Potter, Law Cor. 111, n.; Ashbury R. R. Co. v. Riche, 7 H. L. 653; E. A. R. Co. v. E. C. R. Co., 11 C. B. 775; Pierce v. Madison & Ind. Co., 21 How. U. S. 441; Bank of Augusta v. Earl, 13 Pet. 519; Perrin v. Ches. Co., 9 How. U. S. 172; Hoagland v. Hannibal Co., 39 Mo. 441; Susquehanna & Penn. Co., 8 Gill & J. 248; Sumner v. Marcy, 3 Woodb. & Min. 105; Russell v. Topping, 5 McLean, 134; South Yorkshire Co. v. Great Southern Co., 9 Exch. 55; Bate-man v. Ashton-under-Lynn, 3 H. & N. 323; Norwich v. Norwalk Co., 4 El. & Bl. 397; Hawk v. Eastern Co., 1 De G. F. & J. 737; New Orleans Co. v. Ocean Co., 26 Am. R. 90; Pacific R. R. Co. v. Seeley, 45 Mo. 212; Copeland v. Citizens' Gaslight Co., 61 Barb. 60; Adriance v. Rome, 52 Ib. 399; Brady v. Mayor, 16 How. 432; Frothingham v. McArdle, 6 Hun, 366; Taylor v. Earle, 8 Ib. 1; York Co. v. Winans, 17 How. [U. S.] 30; Abbot v. American Hard Rubber Co., 33 Barb. 578).

Under section 1785 of the Code, which is simply a re-enactment of previous statutes, an action to procure a judgment dissolving a corporation and forfeiting its corporate rights and franchises may be maintained "where the corporation has suspended its ordinary and lawful business for at least one year." Now, surely this company had no power to grant a lease of this hall for three years and do nothing during that period but collect the rent (Conro v. Port Henry Iron Company, 12 Barb. 27; Copeland v. Citizens' Gas Light Company, 61 Barb. 60).

III. These actions being for the recovery of rent for the unexecuted portion of the term, *ultra vires* is a defense (Green's Brice's *Ultra Vires*, 607; Thomas v. Railroad Co., 707 U. S. 71). In Woodruff v. Erie Railway Co. (25 Hun, 246; S. C., reversed, 93 N. Y. 609), the court of appeals held that defendants having had the use of the

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property during the whole of the time for which rent was demanded, was estopped, at least so far as the contract *had been executed*, from setting up the defense of *ultra vires*; the court relying on the analogy of a tenant not being permitted to dispute the title of his landlord. To the same effect are *Dinsmore v. A. & P. R. R. Co.*, 46 *How. Pr.* 193; *President of Union Bridge Co. v. T. & L. R. R. Co.*, 7 *Lans.* 240; *U. P. R. R. Co. v. W. U. Tel. Co.*, 1 *McCrary*, 551. As above stated, the court of appeals, in *Woodruff v. Erie Railroad Co.*, suggest the analogy of the rule forbidding the tenant to dispute his landlord's title. But that rule is certainly consistent with the position we assume, for it is well settled that *the estoppel lasts only so long as the possession continues* (*Jackson v. Spear*, 7 *Wend.* 400; *Tompkins v. Snow*, 63 *Barb.* 525; *Prevot v. Lawrence*, 51 *N. Y.* 219; *Territt v. Cowenhoven*, 79 *Ib.* 400; *Sedgwick & Wait's Trial Title to Land*, § 352).

It seems to be well settled that when a tenant goes into possession under a lease void under the statute of frauds, he may move out, and cannot be held for rent, except for the time while he was in possession (*Thomas v. Nelson*, 69 *N. Y.* 118; *Smith v. Genet*, *N. Y. Daily Reg.* Nov. 10, 1884; *Prial v. Entwistle*, 10 *Daly*, 398).

The foregoing cases not only establish the rule that the defendants can set up the defense of *ultra vires* in an action for the rent during the period while they were out of possession; but they also settle it as the rule that the defendants cannot interpose that defense to an action brought to recover rent for the period while they were in possession. In other words, that the defense of *ultra vires* is available in actions 4 and 6, but not in actions 1 and 2 (*Woodruff v. Erie Railway Co.*, 93 *N. Y.* 609).

BY THE COURT.—O'GORMAN, J.—These actions are two of a series of actions brought by the plaintiff company against the defendants to recover rent for premises situ-

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ated at the corner of Broadway and Forty-first street, in this city, known at the time, as the "Metropolitan Concert Hall."

Of these actions, two, numbered for convenience sake, 1 and 3, were brought to recover rent which accrued for the use and occupation of the premises by defendants, prior to January 31, 1882, under a lease made by the plaintiff to them on September 26, 1881. These two actions were tried, inquests taken, and judgments duly entered for the plaintiff, which judgments were sustained by the general term of this court and finally by the court of appeals, and were paid by the defendants, with interest and costs.

The two actions now at bar, numbered 4 and 6, were brought to recover rent claimed by plaintiff to be due it by defendants under the covenants of the said lease, for periods subsequent to January 31, 1882, during which periods the defendants did not use or occupy the premises, but had previously vacated and abandoned them. These actions were referred to a referee to hear and determine, who made his report, dismissing the complaints in both actions, and from the judgments entered on this report, appeals are taken.

There are but two material questions which need now to be discussed. The first question is whether the validity of the lease from the plaintiff company to the defendants was adjudicated, in the affirmative, in the first actions, 1 and 3, so that defendants are now estopped from denying its validity. The second question is whether the referee, assuming that that question as to the validity of the lease was open for discussion, erred in holding as he did, that the lease was invalid.

The question of the validity of the lease was not adjudicated in the two first actions. It was not in issue in the pleadings, and if it had been pleaded by the defendants, and in issue, it would not have been of any avail as a defense in those actions. Those actions were brought to recover rent for the use and occupation of the prem-

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ises, during periods when the premises were in fact used and occupied by defendants, in execution of the contract of lease, and defendants were therefore estopped from questioning the power of the lessor to make the lease (*Whitney Arms Co. v. Barlow*, 63 N. Y. 62).

As to the second question, the referee held that neither by the law of its incorporation, nor by the general law of this state affecting business corporations, was any power vested in the plaintiff to *lease* the premises; and that it did not appear that the lease was merely temporary and incident to the general business of the plaintiff, and on that ground he dismissed the complaints. He bases his opinion on section 2, subd. 6, chapter 611, laws of 1875, under which the plaintiff corporation was organized, by which it was empowered "to purchase, hold and possess so much real and personal estate as shall be necessary for the transaction of its business, and to sell and convey the same when not required for the uses of the corporation;" and, also, on section 3 of 1 R. S. chap. 18, title 3, which provides, that in addition to the powers expressly given, "no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given." The referee held that these provisions were exclusive, and operated as a prohibition of the exercise of other and distinct powers, of which he held the power to lease would be one.

The facts are briefly these: The plaintiff corporation was not the owner in fee of the premises leased by it to the defendants, but only the lessee, paying a ground rent therefor of \$15,400 per annum, together with taxes, assessments, and water rents. The right of the plaintiff corporation to take and hold the premises under this lease was not questioned. The lease itself was not produced at the trial, and it did not appear for what term it was to continue. The plaintiff company occupied the premises as a concert hall, down to September, 1881, and have not given any concerts or musical entertainments there since

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October 31, 1881. On September 26, 1881, it executed a lease to the defendants, which is in evidence, whereby it leased the premises to them for a period of two months, commencing on October 1, 1881, at a rent of \$2,500 per month, payable in advance, with a provision in the lease that the defendants should be entitled to an option, to be determined on or before November 1, 1881, of a further lease for the period of one year, commencing on December then next, at a rent of \$600 per week, payable in advance, defendants to have a further option at the expiration of that period, for a further lease of two years at a weekly rent of \$750 per week, payable in advance, thus giving to defendants the right to occupy and use the premises for a term of three years. The defendants entered into possession of the premises on October 1, 1881, and made various alterations therein, to render them suitable to operatic or dramatic performances. The name was changed from "Metropolitan Concert Hall" to the "Casino." Defendants exercised the option to extend the lease for one year from December 1, 1881, at the rate of \$600 per week, and occupied the premises until January 31, 1882, and have paid rent for the same. On that day, they vacated and abandoned the premises, and the present actions are brought to recover rent accruing, under the covenants of the lease to them for seven months subsequent to January 31, 1882.

Plaintiff did not own or possess any real or chattel property other than these premises, and, since making the lease to the defendants, plaintiff has practically ceased to perform any of the corporate functions provided for in its charter, and if it had been in its power, under the provisions of the lease to it, to sell the premises, or its interest therein as lessee, it would have been justified under the charter in doing so.

The lease to the plaintiff not having been produced, it cannot be presumed that it contained any provision prohibiting the sale of the lease, or requiring the consent of the lessor to such sale, or that any special reason

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existed, requiring the execution of a sub-lease to the defendants in order to relieve the plaintiff from the continued payment of the annual rent provided for in that lease.

The referee held, that the possession of the premises was not a necessary incident to the continuing of the plaintiff's business as provided for in its charter.

There is no evidence that the lease by plaintiff to defendants was necessary in order to carry out any corporate purpose, or for the execution of any corporate powers, or even to save the corporation from any pecuniary loss ; and it cannot be successfully contended that the plaintiff had, under the terms of their charter, any legal power to lease the premises merely for the purpose of gain or profit to the corporation therefrom.

Unless then, the power to "*sell and convey*" clearly included a power to *lease*, the plaintiff's lease of the premises was, at least in the absence of all proof of imperative necessity for the act, *ultra vires* and void.

The cases cited on the part of the plaintiff (Simpson v. Westminster, &c., *H. L.* 712, and Featherston Hough v. Lee Moore, *H. L.* 1 *Eq.* 318, 329), do not seem to me to apply to the case at bar. The facts in these cases showed necessity, justifying leases by the corporation, and it does not appear that there were provisions in their charters prohibiting their action.

If there were, in fact, any imperative necessity for plaintiff executing this sub-lease to the defendants, the burden of proving the existence of such necessity was on the plaintiff.

It is contended, on the part of the plaintiff, that the referee erred in excluding testimony as to the plaintiff's reasons for ceasing to give entertainments in these premises. It is not apparent how any answer to that question could tend to relieve plaintiff from the difficulty of its case. In the face of the fact, that the plaintiff company had no other property, real or personal,—that it had not, since October 1, 1881, given any musical entertain-

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ments anywhere, or, as far as appears, performed any legitimate act; and that its lease to the defendants of the only property the plaintiff possessed rendered its performance of any corporate act impossible—no evidence as to the reasons for ceasing to give entertainments in the premises in question could be material or relevant.

I am of opinion, that in the absence of sufficient proof, that unless by way of lease the plaintiff could not have disposed of the premises in question, the lease made by it to the defendants is illegal and void, and that as far as the plaintiff's claims for rent in the present actions are concerned, the defendants cannot be held liable to pay rent thereunder.

The judgments should be affirmed, with costs.

TRUAX, J., concurred.

WILLIAM JARVIS, RESPONDENT, v. CHARLES
BAXTER, ET AL., APPELLANTS.

Adjoining owners—rights and duties.—Private nuisance—all concerned in liable.—Circumstantial evidence, proof of facts from which it is permissible for the jury to find a resulting fact.

Defendant Fenton was the owner of a lot, on which he caused a building to be erected. He was to furnish the material, defendant Baxter was architect and superintendent, and, as agent of Fenton, bought the materials that were used, and defendant Whalen was the mason and builder. By reason of the inferior quality of the materials used in the building, and the improper and unsafe manner in which it was constructed, a large portion of the west wall fell on plaintiff's house erected on the adjoining lot, and damaged it and the furniture therein. *Held*, that all the defendants were liable for the damage thus caused.

Dunham, one of the witnesses, testified to finding in the plaintiff's back yard, some mortar, which he produced; that it was picked up right by the side of the wall of the building which was on the lot of defendant Fenton, which wall extended beyond plaintiff's rear wall; that he found brick and said mortar lying there; that it appeared as if a portion of the

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wall above had fallen. *Held*, competent, as the jury might find from it that the mortar came from the wall which fell.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided May 18, 1885.

Appeal from judgment in favor of plaintiff entered on verdict of jury.

The facts appear in the opinion.

Thomas Darlington, for appellants Fenton and Whalen,
W. J. Birdsall, for Baxter.

George W. Cotterell, for respondent.

BY THE COURT.—INGRAHAM, J.—The defendants were jointly engaged in the erection of a building—Whalen as mason and builder, Fenton as owner, and Baxter as architect and superintendent,—a portion of the west wall of which fell upon plaintiff's house, erected on the adjoining lot, and caused damage, to recover which this action is brought.

There was evidence tending to show that the material used in the construction of the building was of an inferior quality, and that the building was constructed in an improper and unsafe manner, and that in consequence of the use of such materials and such imperfect manner in which the building was erected, the building fell.

By the agreement between Fenton the owner, and Whalen, Fenton was to furnish the material required for the building, and the materials used were purchased by Baxter as agent for Fenton.

That the use of property in such a way as to cause an injury to property adjoining, is a private nuisance, and all who join in the erection or maintenance of such nuisance are liable for all injuries caused thereby, is well settled.

In *Heeg v. Licht* (80 N. Y. 579), a private nuisance is defined to be "anything done to the hurt or annoyance to the lands, tenements and hereditaments of another.

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Any unwarrantable, unreasonable or unlawful use by a person of his own property, real or personal, to the injury of another, comes within this definition, and renders the owner or possessor liable for all damages arising from such use." Building a house in such a way and of such poor material that it falls and injures the adjoining property, would, under this rule, be a private nuisance.

In *Hay v. Cohoes Co.* (2 N. Y. 159), it appeared that the defendant, in excavating a canal upon land of which defendant was the owner, caused a large quantity of earth and rock to fall upon plaintiff's land, which caused damage, and in holding it liable, the court said, "a man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful trade. He may excavate a canal, but he cannot cast the dirt and stones upon the land of his neighbor either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom." And in *Tremain v. Cohoes Co.* (2 N. Y. 163), the court held that the evidence offered by the defendant to prove that the work was done in the best and most careful manner, was irrelevant and of no consequence.

The court left it to the jury to say whether or not the defendants built the house as required by the building law, and the jury by their verdict have found that they did not, and that the injury was caused by the failure of the defendants to so construct the buildings.

It is well settled that the creator of a nuisance, or one who more remotely, either by negligence or design, furnishes the means and facilities for the commission of any injury to another which could not have been done without them, is equally responsible with the actual wrongdoer (*Anderson v. Dickie*, 26 How. 105).

I am of opinion that Dunham's testimony as to finding the mortar in the back-yard of the plaintiff was com-

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petent. The facts he stated would have permitted the jury to find that the mortar was picked from a place where it would likely be dropped from the wall as it fell, there being no evidence that would otherwise account for it being in the back-yard, as the jury might find. The mortar in the state in which it was found, would enable a jury by the aid of witnesses to say what had been its constituents from the first. If Dunham said that there had been not sufficient lime in it in the beginning, there was no uncontrovertible evidence, that even if a great deal had been washed out, it was impossible for an expert to calculate how much there had been at first.

The defendant Fenton gave such an account of his relation to Baxter, that it, coupled with other facts in the case, shows that neither could have been harmed by pressing an inquiry as to whether they occupied the same office.

I think the judgment should be affirmed, with costs.

SEDGWICK, Ch. J., concurred ; TRUAX, J., dissented.

LAWRENCE J. CALLANAN, ET AL., RESPONDENTS, v.
GEORGE F. GILMAN, APPELLANT.

Side-walk—obstruction of, substantially continuous—public nuisance.—Special damage—slight evidence of, will sustain injunction against, at suit of private citizen.—Order not appealable under § 1816 Code, by including in notice of appeal from judgment.

A plankway forming a continuous bridge across a sidewalk and totally obstructing it during a greater part of every business day, is a public nuisance.

A private citizen may have an injunction against such a nuisance on showing special damage.

But slight evidence of special damage will uphold a judgment for an injunction against such a nuisance.

In such a case, an injunction against obstructing, by any plankway or bridge, or the like, extending across the sidewalk and elevated above,

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and against hindering the plaintiffs, their employees and customers from having free use and passage along the sidewalk in front of defendant's premises, is not too broad.

An order made in an action tried before a judge without a jury, after the filing of his decision, denying a motion, made after such filing, to amend the answer, does not affect the final judgment, and is, therefore, not appealable under § 1316.

Semble, the proposed amendment being to remedy a supposed defect in the denials, and both parties on the trial having, on the trial, treated the denials as sufficient, an amendment was unnecessary.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided May 18, 1885.

Appeal from judgment awarding the plaintiffs an injunction.

Plaintiffs' evidence as to the special damages suffered by them from the nuisance enjoined, in addition to that referred to in the opinion of Judge O'GORMAN, was as follows : One of the plaintiffs testified, " We think a great portion of our customers come to our store from Broadway along the southerly side of Vesey street. I have seen the effect of this bridge on pedestrians. The effect has been to stop them, and it is my strong impression that it drives a good many of them to the other side of the street. It has prevented our customers coming to the store. Mr. Hanshaw " (whose evidence is referred to by Judge O'GORMAN) " and his partner. If I thought it necessary I could name several. I have not been able to transact my business with the same convenience to myself and my employees since this obstruction as I did before. I complained to Captain Berghold of this obstruction, because it was a decided detriment to my business, and is in my opinion, a decided loss to all owners of property on the street, and a detriment to the business interests of the street. The injury to me was great. I cannot tell whether my business increased or decreased between July 9, 1883, and August 13, 1883. There is no question at all but that travel has been diverted by the use of this

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bridge." Another of the plaintiffs testified, "The effect of this obstruction on pedestrians is very bad. We have had numerous complaints from our customers as to its being a positive obstruction. It is an obstruction across the sidewalk, and quite a number of our customers come down the other side of the street rather than go over the obstruction. I cannot, at this moment, name any customers who complained of this plank." There was considerable evidence to the effect that travel was diverted by reason of the bridge.

The original answer denied each allegation of the complaint "except those thereafter admitted, qualified or explained." After the filing of the decision of the judge, defendant moved to amend the answer so as to deny, in the mode required by the Code, certain of the allegations of the complaint, the evidence as to which, on both sides, had been fully heard on the trial. The motion was denied.

Other facts appear in the opinion.

Abbett & Fuller, attorneys, and of counsel for appellant, on the questions considered in the opinions, argued :—I. The plaintiffs failed to establish that defendant was maintaining a public nuisance. (a) The bridge was a temporary and partial obstruction necessitated by business, and was not unlawful in itself ; and, therefore, not a public nuisance (*Wood on Nuisances*, § 259, and cases cited, § 801 ; *People v. Cunningham*, 1 *Den.* 524). There is a very substantial distinction between encroachments amounting to a purpresture, and a temporary and partial obstruction necessitated by the business of the community. And this distinction is well shown by such cases as *Knox v. Mayor* (55 *Barb.* 404); *Trenor v. Jackson* (46 *How.* 389); *Ely, Mayor, v. Campbell* (59 *How. Pr.* 333); *Lawrence v. Mayor* (2 *Barb.* 577); *Howard v. Robbins* (1 *Lans.* 63); *Alb. L. J.* vol. 20, p. 183. This bridge is used by authority of the board of aldermen (*Corporation Ord.*, rev. 1880, p. 138, § 21 ; p. 223, § 285). The legislature has

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conferred upon the city government the power to decide what is a reasonable and proper use of the streets. Acts may be authorized by such government which, without its authority, might be prohibited. This is required by public necessity. Thus, it is well settled that "the legislative authority is competent to declare the uses to which highways may be appropriated, and to impart to municipal corporations both permissive and restraining powers over the subject matter. If neither the constitution nor the laws have been transcended in a given case, no individual can sustain a suit against a party exercising a right by competent authority. The aid of an injunction cannot be invoked to prevent, nor will an action lie to redress, consequential injuries necessarily resulting from the lawful exercise of a right granted by the sovereign power of a state, or conferred by competent municipal authority" (*Williams v. N. Y. Central R. R. Co.*, 18 *Barb.* 232). The reversal of this case upon appeal (16 *N. Y.* 111), was upon the ground that no lawful right had been given, and that equity might be invoked to prevent a multiplicity of suits. Broad as are the powers of courts of equity, they cannot interfere with the fair exercise of discretion lawfully given to the city government (*Leigh v. Westervelt*, 2 *Duer*, 618; *High Injunctions*, § 767 [2 ed.], and cases cited; *People ex rel. Murphy v. Kelley*, 76 *N. Y.* 475). A public nuisance must be occasioned by acts done in violation of law. A work which is authorized by law cannot be a nuisance (*Hinchman v. Paterson Horse R. R. Co.*, 17 *N. J. Eq.* 77; *Bordentown & S. Amboy Turnpike Co. v. Camden & Amboy R. R. Co.*, 2 *Harr.* 314; *Davis v. Mayor*, 14 *N. Y.* 506; *Wood on Nuisances*, §§ 746, 750, and cases cited; also § 753; *Hatch v. Vermont Central R. R. Co.*, 25 *Vt.* 67). The Penal Code (§ 385, subd. 3), preserves this distinction. The argument of the plaintiffs and opinion of the judge at special term are based upon a conception of the purposes and uses of streets in this city, which, we respectfully submit, is erroneous. It is a well known fact, and one shown by the evidence in this case, that this

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city is built in a rather unscientific way, and the streets are not mere passage ways, but may more fitly be called the arteries, through which the trade and travel, which are the blood of commercial cities, are designed to flow. Propositions, which were true generations ago, when applied to a provincial city of England, are not true now of New York city with its large population, cramped by the form of the wedge on which it is built. The streets have been laid out and may be used for all the purposes of communication, loading and receiving goods, and the necessary transaction of the immense business of a great mercantile centre. They are not solely to walk over, and the rights of pedestrians to the sidewalk are not so absolute but that they must give way to public necessity or convenience, especially when there is provided a convenient and proper passageway over the adjoining vault lights, which are very slightly elevated and five feet wide. How much less inconvenience than if the defendant backed his cart across the walk, as he might properly do. In *Matthews v. Kelsey* (58 Me. 56), this question is discussed, and it is there held, that for the purpose of unloading a car of flour, a merchant whose store is on the street may use skids temporarily elevated above the ground, and extending from the car door fifty feet from the store, provided there is ample room between the car and the opposite side of the street to accommodate the travel of the street.

II. But even if the plank did constitute a public nuisance, the plaintiffs did not suffer special damage from its maintenance. "No person can maintain an action for damages from a common nuisance where the injury and damages are common to all" (*Wood on Nuisances*, § 618; 1 *Coke's Inst.* 56, note a). Mere obstruction is not sufficient (*Wood on Nuisances*, § 632; *Baxter v. Winooski Turnpike Co.*, 22 *Vt.* 114; *Hutchinson v. Railroad Co.*, 28 *Ib.* 142; *Iveson v. Moore*, *Ld. Raym.* 486; *Rose v. Miles*, 4 *M. & S.* 101; *Greasley v. Codling*, 2 *Bing.* 263). The damage "must be of a different character, special and apart from that which the public in general sustain, and

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not such as is common to every person who exercises the right that is injured." "It is not enough that he has sustained more damage" (*Wood on Nuisances*, § 619, and cases cited; *Pierce v. Dart*, 7 *Cow.* 609; *Doolittle v. Supervisors of Broome Co.*, 18 *N. Y.* 155; *McCowan v. Whitesides*, 31 *Ind.*; 2 *Alb. L. J.* 32). It will not suffice that the person complaining merely showed a violation of his rights. He must show such a violation as is or will be attended by serious damage (*Bigelow v. Hartford Bridge Co.*, 14 *Conn.* 565; *Pen. Code*, §§ 385, 386). The proper measure of damages (for maintaining a nuisance) is the difference between the rental value, free from the effects of the nuisance for which damages were claimed and subject to it (*Jutte v. Hughes*, 67 *N. Y.* 271; *Francis v. Schoellkopf*, 53 *Ib.* 152; *Knox v. Mayor, &c.*, 55 *Barb.* 404). The plaintiffs themselves testify that there has been no decrease of rental, or in the value of property in the neighborhood. Not one witness gives the faintest intimation of a contrary opinion. Evidence of special damages, other than these, was inadmissible, and proper exception was duly taken by defendant at the trial. This evidence should have been excluded, and plaintiffs' case is then bare of any evidence of special damage (*Bliss' Code*, 293, notes *l*, *m*, *n*, *p*, *r* and *t*; *Green v. N. Y. C. & H. R. R.*, 12 *Abb. N. S.* 124; *Hallock v. Miller*, 2 *Barb.* 630; *Tobias v. Harland*, 4 *Wend.* 537; *Havemeyer v. Fuller*, 60 *How. Pr.* 322; *Bergman v. Jones*, 94 *N. Y.* 51). Even with this evidence, however, the only proof of loss is the temporary loss of one customer, who has returned and still trades with plaintiffs. That customer bought goods also of other grocers while the injunction was in force, and plaintiffs fail to show any difference in amount of business by reason of the alleged obstruction.

III. The court could not, in this action, grant the relief prayed for and set forth in the judgment. (*a.*) If a private action could be maintained, it should have been an action of nuisance, not a suit for injunction. The legislature has provided a complete remedy by the action of

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a nuisance (§§ 1660-1663, *Code of Civ. Proc.*), and therefore a court of equity should refuse to entertain an action to enjoin and abate such a nuisance (*Remington v. Foster*, 42 *Wis.* 608). (b.) Again, "If the injury is trifling, and the nuisance temporary, and the party has an adequate remedy at law, the courts will sometimes refuse to interfere, when the inconvenience and damage resulting to the defendant will be greater by its interference than the injury to the plaintiff will be if the remedy is denied (*Wood on Nuisances*, § 799, and cases cited). Under the principles of the following authorities, the action is not sustainable (*Parker v. Winnepiseoggee L. C. & W. Co.*, 2 *Black*, 545; *Hamilton v. N. Y. & Harlem R. R. Co.*, 9 *Paige Ch.* 173; *Bliss' Code* [2 ed.] 543, § 629, notes n, o, p, q, r, s; *Wood on Nuisances*, 817, note §§ 778, 780, 785; *Child v. Douglas*, 5 *D. M. & G.* 741; *Story's Equity* [12 ed.] § 924, and cases cited; *High on Injunctions* [2d ed.], § 844, and §§ 761-763 and cases cited; *Higbee v. Camden & Amboy R. R. Co.*, 20 *N. J.* 435). Unless the equities are clearly established, a court of equity should not interfere until after a trial and verdict by the jury. Whether a particular use is an unreasonable use and a nuisance, is a question of fact to be judged of from the circumstances of each case by the jury (*Wood on Nuisances*, § 251; *Wetmore v. Tracy*, 14 *Wend.* 250; *Com. v. King*, 13 *Metc. [Mass.]* 115; *Harlow v. State*, 1 *Iowa*, 439; *Angel on Highways*, 206; *Ladie v. Arnold*, 1 *Salk.* 168; *Harrower v. Ritson*, 37 *Barb.* 301; 1 *Hawk. P. C.* 76, §§ 48-60; *James v. Hayward*, *Cro. Car.* 184; *Rogers v. Rogers*, 14 *Wend.* 131). Thus, the Code provides that actions for a nuisance shall be tried by a jury (*Code Civ. Proc.* § 968; *Hudson v. Caryl*, 44 *N. Y.* 553). Equity will refuse to interfere where a summary remedy is provided for abatement by municipal authorities of all nuisances (*Powell v. Foster*, 59 *Ga.* 790).

IV. The motion to amend the answer *nunc pro tunc* should have been granted (§ 723 *Code Civ. Proc.*; *Lounsbury v. Purdy*, 18 *N. Y.* 515; *Burley, Recr. v. German*

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American Bank, 111 *U. S. R.* 216; *Hatch v. Central National Bank*, 78 *N. Y.* 487). The object of the provision is that the pleadings may, by such amendment, show the questions that were actually litigated. And the amendment accomplishes in form what the appellate court will do even without such formal correction (*McKenzie v. Ward*, 58 *N. Y.* 541; *Tisdale v. Morgan*, 7 *Hun*, 585).

V. The order may be reviewed on this appeal (§§ 1301-1316, *Code Civ. Proc.*)

Edwin M. Wight, attorney, and of counsel for respondents, argued :—I. The law of this case was well stated by the trial judge in his opinion, in which he cited : *Luce v. Alexander*, 49 *Sup. Ct.* 202; *Clark v. Dillon*, 4 *N. Y. Civ. Pro.* 245; *Davis v. The Mayor, &c.*, 14 *N. Y.* 506; *Tremor v. Jackson*, 15 *Abb. N. S.* 115; *Ely v. Campbell*, 59 *How.* 333; *People v. Mayor*, 59 *Ib.* 277; *People v. Mayor*, *Daily Reg.* April 23, 1884; *Metropolitan Tel. Co. v. Colwell Lead Co.*, *Daily Reg.* Aug. 13, 1884. In addition to those cases, see also *Hart v. Mayor*, 9 *Wend.* 571; *People v. Cunningham*, 1 *Den.* 524; *Knox v. Mayor*, 55 *Barb.* 405; *People v. Kerr*, 27 *N. Y.* 188; *Moore v. Jackson*, 2 *Abb. N. C.* 211; *Greene v. N. Y. C. & H. R. R.*, 12 *Ib.* 124; *Com. v. Passmore*, 1 *Serg. & R.* 219; *Rex v. Jones*, 3 *Camp.* 230; *Wood on Nuisances*, ch. 25; *Tuttle v. Brush, &c. Co.*, 50 *Super. Ct.* 464; *Hallock v. Baranski*, *Daily Reg.* Aug. 9, 1884; *Tiffany v. U. S. Illuminating Co.*, *Daily Reg.* April 9, 1884.

II. Any person injuriously affected by a public nuisance may maintain an action to restrain it (*Knox v. Mayor*, 55 *Barb.* 405).

III. The bridge in question constitutes a nuisance, public and private (*Wood on Nuisances*, § 259). It is doubtful if equity will sanction in a great public thoroughfare, the carrying on of a business differing wholly in character from its immediate surroundings, so as to greatly inconvenience such surroundings, even when the business is conducted with the most scrupulous regard for

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the rights of others consistent with such business (*Heeg v. Licht*, 80 N. Y. 579, and cases cited); but, when, as in this case, defendant brings into a retail business street a depot of distribution for about 130 stores in various parts of the country, requiring, by its very nature, much moving of goods to and from wagons in the street, and, instead of doing that business in a way to obstruct the sidewalk as little as possible, bridges the same, necessarily obstructing it entirely, and maintains such bridge, as in this case, he is without any shadow of excuse, and the court will restrain the maintenance of such a structure.

IV. The motion to dismiss the appeal from the order denying the motion to amend the answer should be granted under the provisions of section 1316, limiting the class of orders which are brought up for review by an appeal from a final judgment. They must "necessarily affect the final judgment" (*Hunt v. Chapman*, 62 N. Y. 333; *Thurber v. H. B. M. & F. R. R. Co.*, 60 *Id.* 326).

BY THE COURT.—INGRAHAM, J.—The court below found, as matter of fact, that plaintiff Callanan is the owner, and that the plaintiffs as copartners are the lessees of the premises No. 41 Vesey street, and that plaintiffs and their predecessors in business have carried on business as wholesale and retail grocers, at such place, for upwards of forty years; that defendant has constructed and maintained, during a considerable portion of the business hours of each day, in front of the building occupied by him, Nos. 35 and 37 Vesey street, a plankway or bridge, one end resting on the stoop of the building occupied by defendant, and the other end resting on a wooden horse or rest in the roadway of Vesey street, thus forming a continuous bridge from said stoop to the roadway of the street, over and across the sidewalk; that said bridge forms an obstruction to the sidewalk of said Vesey street, during a greater part of every business day; that said obstruction is a special injury and damage to the plaintiffs, and that they have lost custom by reason of its

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maintenance ; that the injury to the plaintiffs caused thereby is great and cannot be adequately compensated for in money, and is incapable of exact measurement in damages, and that plaintiffs have no adequate remedy at law therefor ; and as conclusion of law, that plaintiffs are entitled to an injunction enjoining the defendant from obstructing the sidewalk by such plankway or bridge.

The evidence of the special damage is slight, but after a careful examination of the case, we think there is sufficient to sustain the findings.

In *Milhau v. Sharp* (27 N. Y. 625), the court of appeals said : " It is insisted by defendants' counsel that the findings of the judge at special term show that the injury complained of was a public and not a private nuisance, and that consequently a private action to prevent or restrain it could not be maintained. It is not an available objection, to actions of this nature, that the wrong complained of constitutes a public nuisance, provided the plaintiffs are subjected by it to any special injury not common to the public or to large classes of people," and cites with approval from 2 *Story's Equity*, § 925 : " There must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief, must occasion a constantly recurring grievance which cannot be otherwise prevented but by injunction."

Under this rule, the judgment was the necessary result of the findings of fact, and as the findings of fact cannot be disturbed, the plaintiff was entitled to the judgment, and the judgment appealed from must be affirmed, with costs.

The defendant also seeks to review an order of the special term made on the 15th day of October, 1884, denying the motion of the defendant to amend the answer. The motion was made and the order sought to be reviewed was entered after the decision of the judge, before whom the action was tried, was filed. No separate appeal

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to the general term from this order is taken, and the order was not one which can be reviewed under section 1316 of the Code, on the appeal taken from a final judgment. The motion was one addressed to the discretion of the court, and did not affect the final judgment.

We think, however, that the motion was unnecessary. On the trial of the action, it was not claimed by plaintiffs that the denial in the answer was insufficient. The plaintiffs undertook the burden of proving the obstruction in the street and the special damage. The court received the evidence offered by the defendant to overcome plaintiffs' evidence to sustain such allegations.

Under such circumstances, we think that neither of the parties could claim that the answer was insufficient, but as before stated, the order is not before us for review.

The judgment should be affirmed, with costs.

SEDGWICK, Ch. J., concurred.

O'GORMAN, J.—[Dissenting.]—This is an appeal from a judgment restraining the defendant from obstructing the southerly side of Vesey street in front of his premises (Nos. 35 and 37), by any plankway or bridge, or other like obstruction, elevated above the sidewalk and reaching from said premises or from the stoop in front thereof to the roadway, or from hindering the plaintiffs or their employees and customers from having free use and passage along the sidewalk in front of defendant's said premises.

The action was tried at special term, without a jury. The plaintiffs, in their complaint, did not ask any judgment or relief, by way of damages, but only for an injunction.

They alleged that the obstruction complained of was a public nuisance, but of special injury to the plaintiffs and their business; that the injury was great and irreparable, incapable of exact measurement in damages, and could not be adequately compensated in money, and that actions for each renewal of the nuisance would cause a multiplic-

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ity of litigation. No evidence was given on the part of the plaintiffs, from which any adequate or reasonable measure of damages could be ascertained, or which would have warranted a verdict for more than nominal damages, if the action had been brought to recover damages.

The material facts, as they appeared in evidence, are these : The plaintiffs, before December, 1882, and at the time of bringing this action, occupied premises on the south side of Vesey street, and used them in their business of wholesale and retail grocers. Their premises were one hundred and twenty-five feet west of the corner of Church street and Vesey street. The defendant also occupied premises on the south side of Vesey street, and used them in the same business of wholesale and retail grocer. His premises were on the corner of Church street, and had a frontage on Church street, as well as a frontage on Vesey street, and were to the east of the premises of the plaintiffs. About December 1882, the defendant commenced to use, in loading and unloading his goods, a plank skid or bridge, about three feet wide, starting from about eighteen inches inside his stoop line, and extending thence over the sidewalk to a wooden horse or rest (such as masons use), at the curb, where it rested near the end of his trucks. This skid was about twelve inches above the sidewalk at the stoop line, and about two feet six inches at the curb. On the stoop in front of defendant's premises, between the point where the skid rested and the house front, there was left a space, which might be used by pedestrians, of about five feet. This bridge was used by the defendant continuously during the greater part of every business day, and there is evidence to sustain the finding of the trial judge, that there was no necessity for such use of the bridge by the defendant. On this subject there was considerable conflict of testimony. There was enough of evidence, however, to sustain the conclusion that this continuous use of this bridge by the defendant seriously impeded pedestrians in passing to and fro along this street, and, for a considerable period in each business

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day, obstructed the sidewalk and created a public nuisance, for abatement of which, action would lie on behalf of the people of this state.

In *Green v. R. R.* (12 *Abb. N. C.* 143), the learned trial judge says : " It is well settled law that the conduct of any business, intrinsically lawful, may give rise to a cause of action, if, under all the circumstances, it occasions an unreasonable encroachment on the public highway. Thus, in *Rex v. Jones* (3 *Camp.* 230), Lord ELLENBOROUGH said, ' A cart or wagon may be unloaded at a gateway, but this must be done with promptness. The defendant is not to eke out the inconvenience of his own premises by taking the public highway into his timber yard ; and if the street be too narrow he must move to a more commodious situation for carrying on his business.' In the *King v. Russel* (6 *East*, 426), it was held that if the nature of the defendant's business were such as to require the loading and unloading of so many more wagons than could be done conveniently within his own private premises, he must either enlarge his premises or move his business to a more convenient spot ; that the primary object of the street was for free passage of the public, and anything which impeded that free passage was a nuisance. And in *Moore v. Jackson* (2 *Abb. N. C.* 211), it was held that a systematic and continued encroachment on a highway, though for the purpose of carrying on a lawful business, is unjustifiable." The public are entitled to an unobstructed passage upon the streets, including the sidewalks of the city (*Clifford v. Dam*, 81 *N. Y.* 52). The law of the public street is motion. A mere temporary occupation of a part of a highway, however, by persons engaged in receiving or delivering goods from stores or the like, is allowed from the necessity of the case, but a systematic and continued encroachment on a highway, though for the purpose of carrying on a lawful business, is unjustifiable (*Moore v. Jackson*, 2 *Abb. N. C.* 211, 214). A temporary and necessary use, such as the delivery of barrels from wagons on skids across a sidewalk, is permissible, if

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sufficient space is left on the other side of the roadway (*Matthews v. Kelsey*, 58 *Maine*, 56). The public nuisance, therefore, in the case at bar, does not arise from an obstruction to the sidewalk by reason of its use for an unlawful purpose, but by reason of its excessive, continuous and unnecessary use for a lawful purpose.

So much as to the relations and rights of the public at large, as against obstructions, and in the abatement thereof.

This action, however, is not brought on behalf of the public for the abatement of a public nuisance, or even on behalf of numerous property owners, or business interests in Vesey street, but only by the plaintiffs as private individuals, on their own behalf, and because of a special injury and damage to them, different from the damage inflicted on the public, and as to which special damage the public have no interest or concern.

The trial judge has found that the plaintiffs have lost custom by reason of the maintenance of this bridge by the defendant. The evidence—and the only specific evidence on that subject—is that given by a witness, who stated that he was the publisher of a newspaper—had an office at 30 Vesey street, at corner of Church street, for nearly three years—he generally bought his groceries down town, mostly at plaintiffs' and Bennet's, also at Stiner's, and perhaps at other places,—quite a number of times, he found the street blocked up with this bridge, and it caused him to go to the other side of the street—he did not care to go into the street when it was muddy—bought probably four-fifths of his groceries from plaintiffs—does not think he bought quite that proportion now. There is no evidence, on the part of the plaintiffs, of the quantity or value of the groceries which the witness had been in the habit of buying from them, before the use of this skid by the defendant, or the extent of the decrease in amount or value of his purchases afterwards, or any evidence whatever of any specific loss, on which any but nominal damages could be awarded. There was no attempt to prove

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diminution of the rental value of plaintiffs' premises, which was a measure of damages adopted in *Francis v. Schoellkopf* (53 N. Y. 154); *Green v. R. R.* (*supra*, 146). Thus, the question of damages which plaintiffs have heretofore incurred, has been left wholly speculative, and there is no evidence that any injury could be reasonably anticipated or feared by the plaintiffs, by reason of the continuance of the use of this skid by the defendant, other or greater than that to which plaintiffs had been theretofore subjected.

As has been before stated, the alleged nuisance here complained of, does not arise from any trespass on, or abuse of the sidewalk for any purpose, in itself noxious or unlawful, but from an unnecessary, continuous, and excessively prolonged use of the sidewalk for a purpose, in itself legitimate and proper. In such cases, courts of equity have been slow to interfere and reluctant to apply the remedy of injunction. It was said by an eminent judge, "that no instance could be found of the interposition by injunction where the nuisance could be regarded as only eventual and contingent" (2 *Story Eq. J.* § 924 and note). "A court," says AGNEW, J., in *Huckinstine's Appeal* (70 Penn. 81, 102), "whose arm may fall with crushing force on the every-day business of men, destroying lawful means of support, cannot approach such cases with too much caution." Indeed, there cannot be a jurisdiction exercised by a court of equity, demanding more delicacy in its use.

It is clear, that unless plaintiffs have proved some special, substantial, and appreciable damage, other than that sustained by the people at large, they are not entitled to an injunction. And I am unable to see why there should have been any difficulty in proving the damages, if any there were, which have been inflicted on the plaintiffs. There is no foundation for an injunction on the ground that any injury other or greater than what has occurred in the past, would occur in the future, or any injury that could be in its nature irreparable, that is

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to say, irreparable, not because it would be so small that it could not be estimated, but because it was likely to be so great, that it would be incapable of compensation in damages.

Entertaining these views, I am not satisfied that the plaintiffs have proved facts, entitling them to the exercise of the extraordinary powers of a court of equity in their behalf. If the special injury which they complain of, be not susceptible of exact measurement in damages, it is not easy to avoid the suspicion that it was an injury too inconsiderable, and insignificant to warrant any serious apprehension of its recurrence in the future, or any claim on this court for protection against it. In cases of this kind, the doubt will naturally suggest itself, whether the court in consenting to protect the plaintiffs from an uncertain and exaggerated danger, may not be the means of inflicting on the defendant a real and substantial injury.

There is still another objection to the scope and form of the judgment, which is, I think important. The injury done to the plaintiffs, if any, arises not from the use of the bridge by the defendant, because the use, within proper limits as to time, and for a proper purpose, would have been unobjectionable. The bridge became objectionable, from its abuse, by keeping it up continuously and for periods of time too protracted, and when its use was not necessary to the defendant's business. The judgment rendered made no distinction in this regard, but restrained the defendant absolutely, and without any limit as to the time or occasion.

This was, I think, a judgment larger in its scope; and operation, than the plaintiffs were entitled to, in any aspect of this case, and would have the effect of restraining the defendant, not only from the unnecessary, continuous, and unlawful use of this bridge, but from the occasional and proper use of it, as a necessary means of carrying on his business, not in itself unlawful, and against which, neither the public, nor the plaintiffs could have any legitimate cause of complaint.

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For these reasons, I am of the opinion that the judgment should be reversed, with costs, and that a new trial be ordered.

THE AMERICAN TELEGRAPH & CABLE CO.,
RESPONDENT, v. HENRY DAY, IMPEADED, APPELLANT,
AND BYRON G. DE WOLF AND S. H. SWAN,
RESPONDENTS, ET AL.

Action of interpleader, or in that nature.—Bill of peace.—Multiplicity of actions.—Stock certificate, acceptance of, surrender, and issue of new on forged powers—injunction as to.

Where the perplexity and danger upon which the plaintiff founds his action of interpleader, or one in that nature, arises out of an act done voluntarily and advisedly by him, it does not arise without his fault, and the action will not lie.

One charged with a tort in the conversion of property cannot interplead the party making the charge with others claiming adversely to him, under whom the party charged acted.

Multiplicity of actions will not, of itself, constitute an equity on which to found an equitable action. The anticipated issues between the plaintiff in the equity action and the various defendants thereto must be *ad idem*.

The plaintiff accepted the surrender of certain certificates of its stock, and issued new ones upon alleged forged powers of attorney, and the owner of the surrendered certificates brought an action against it, praying that the surrendered certificates or others of the same form and tenor be delivered to him, and all dividends earned be paid to him, and that he be adjudged the owner of the shares represented by the surrendered certificates, and that the company be adjudged to recognize him as such owner; thereupon, the plaintiff commenced an action against him, and the persons who procured, and those who then held certificates for the stock which had been before represented by the surrendered certificates, praying, among other things, for an injunction against such owner prosecuting his action, and against the other defendants commencing any action against it based upon claims of ownership of the stock which had been represented by the surrendered certificates, or of dividends declared thereon. An injunction order in conformity with this prayer was granted.

Held, under the foregoing principles, that plaintiff was not entitled to the injunction.

Statement of the Case.

W. SELDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided May 25, 1885.

Appeal from order denying a motion to vacate an injunction.

Mr. Day, the appellant, was the owner of seven hundred shares of the plaintiff's capital stock, represented by seven certificates, each for one hundred shares, standing in his name and transferable on the plaintiff's books by Mr. Day or his attorney, on the surrender of the certificates. The complaint alleges that the certificates were, between April 25, 1883, and October 30, 1883, surrendered to the plaintiff, with powers of attorney indorsed purporting to be executed by Mr. Day, authorizing the transfer of the stock on the plaintiff's books, and that in accordance therewith the stock was transferred by it. Mr. Day alleges that the certificates were wrongfully taken from his possession; that his signatures to the powers of attorney were forgeries; that he never transferred or authorized the transfer of the stock; and that any attempted transfer was fraudulent as to him. To compel the plaintiff to recognize him as the owner of his stock, Mr. Day sued the plaintiff in this court, praying as stated in the head-note. After the action became at issue, the plaintiff moved, at special term, to compel Mr. Day to join as parties, certain persons to whom it claimed that it had issued stock upon the forged powers of attorney. The court denied the motion upon the ground that such parties were neither interested in nor parties to the controversy between the plaintiff and Mr. Day.

Thereupon the plaintiff brought this action, joining as defendants—(1) Mr. Day; (2) The firms of Denslow, Easton & Herts and De Wolf & Swan, as to whom the complaint alleges that they presented Mr. Day's certificates, with the forged powers of attorney, to the plaintiff, certified to the genuineness of Mr. Day's signatures, and demanded new certificates; (3) Henry W. Putnam,

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Thomas Emory's Sons, George D. Patten, Jr., Work, Strong & Co., William Whitewright and John B. Gale, who now hold certificates for the stock which the plaintiff alleges that it issued in place of Mr. Day's certificates; and asking that Mr. Day be compelled to litigate his claim to his seven hundred shares in this action; that it be determined as between him and the other defendants, who has the right to the possession of the certificates for the shares; that the claims of the other defendants to the shares, and to the certificates issued therefor, and to the dividends on the shares, may be litigated in this action; and that Mr. Day may be enjoined from prosecuting the action commenced by him; and that all the defendants be enjoined from commencing any action against the plaintiff based upon claims of ownership of the said shares or dividends declared or earned thereon. The complaint further asked that, if Mr. Day were adjudged to be entitled to his stock, the defendants holding new certificates might be compelled to deliver them up, or to account to Mr. Day or to the plaintiff for the value, etc.

Upon the complaint and an affidavit of general verification, plaintiff obtained an injunctive order, in conformity with the prayer of the complaint. Mr. Day thereupon moved to dissolve the injunction, which motion was denied, and an order made accordingly, from which this appeal is taken.

Franklin B. Lord, attorney, and *John E. Farsons*, of counsel for appellant Day, argued :—I. If Mr. Day establishes in his action that he is the owner of his stock; that it has never been transferred by him or by his authority; and that the powers of attorney upon which the plaintiff issued new certificates, were forgeries,—he is entitled to judgment in his favor, compelling the plaintiff to recognize him as a stockholder with all the rights belonging to him as such (*Pollock v. National Bank*, 7 N. Y. 274; *Telegraph Co. v. Davenport*, 97 U. S. 369; *Pratt v. Taunton Copper Co.*, 123 Mass. 110; *Midland Railway v. Taylor*, 8

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H. L. Cas. 751). This is none the less so that the plaintiff has, upon the forged powers of attorney, issued new certificates (*cases supra*). Mr. Day's certificates are in possession of the plaintiff. It holds them as Mr. Day's property. If Mr. Day's certificates were outstanding in the hands of a third person, who, as against the plaintiff, claimed to own them, that person would be a proper, if not a necessary party, to Mr. Day's action against the plaintiff (*Cottam v. Eastern Counties R'y Co.*, 1 *Johns. & Hem.* 243; *Marsh v. Keating*, 1 *Bing. N. C.* 198 [House of Lords]; *Stone v. Marsh*, 6 *B. & C.* 551). But that is not this case. Mr. Day's certificates are not outstanding. They are in the possession of the plaintiff. There is no adverse claim to Mr. Day's certificates; and in the controversy between him and the company no third person is interested.

II. If Mr. Day fails to establish what he has alleged in his action against the company, there must be judgment in that action dismissing his complaint. Certainly no third person is a party to a controversy which is to bring about that result.

III. The controversy between the plaintiff and the defendants, other than Mr. Day, on the basis that Mr. Day shall succeed, is entirely different to that between Mr. Day and the company. (1) If the plaintiff has any claim against Denslow, Easton & Herts, and DeWolf & Swan, upon whose request the stock was transferred, and who surrendered to the plaintiff Mr. Day's certificates with the forged powers, that claim is correctly asserted by the plaintiff in his complaint. They are responsible in damages for any loss which may result to the plaintiff (*Brown v. Howard Fire Insurance Co.*, 42 *Md.* 384; *Lowry v. Bank*, *Taney C. C. R.* 310). No title to Mr. Day's stock could pass to these defendants through the forged powers (*Story Bills*, § 111; *Hambleton v. R. R. Co.*, 44 *Md.* 551; *Thomson v. Bank of B. N. A.*, 45 *Super. Ct.* 1; *aff'd*, 10 *W. Dig.* 477). (2) Any relation of these defendants to the plaintiff is that of guarantors. The case is the same as

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that of one who has warranted the title of a defendant in ejectment. The plaintiff is not compelled, in the interest of the defendant, to make him a party to his suit (*Pratt v. B. & O. R. R. Co.*, 126 *Mass.* 443 ; *Cottam v. Eastern Counties R'y Co.*, 1 *Johns. & Hem.* 243 ; *Taylor v. Bank of England*, 28 *Beav.* 287 ; *aff'd, H. L. Cas.* 751 ; *Sloman v. Bank of England*, 14 *Sim.* 475 ; *Dalton v. Midland R'y Co.*, 12 *C. B.* 458) (3) The only other class of defendants is those to whom stock has been issued upon the surrender of the first certificates issued in place of Mr. Day's stock. The plaintiff must either make good to them their stock, or must compensate them in damages for any loss which they have sustained in relying upon the plaintiff's certificates (*N. Y., N. H. R. R. Co. v. Schuyler*, 34 *N. Y.* 30 ; *Davis v. Bank of England*, 2 *Bing.* 293 ; *Ashby v. Blackwell*, 2 *Eden*, 299 ; *Pratt v. Taunton Copper Co.*, 123 *Mass.* 110 ; *In re Bahia & San Francisco R'y Co.*, *L. R.* 39 *B. D.* 584). With such action Mr. Day has nothing to do.

IV. Some of the defendants assert that Mr. Day authorized the transfer of his stock. If he did, he will be beaten in his suit. He can only maintain his suit by proving what he has alleged—that the stock was wrongfully taken and that his signatures to the powers were forged.

V. What really the plaintiff desires is to try six or eight lawsuits in one. Mr. Day is only interested in the suit which he himself has brought. He should not be embarrassed by being compelled to participate in the trial of other actions with which he has no concern. So far as concerns the present holders of the new certificates, they are neither parties to a controversy with Mr. Day, nor is one a party to a controversy between the plaintiff and any other. Each of Mr. Day's certificates was separately surrendered to the company on an occasion when no other certificate was surrendered, and a new certificate was issued to a party to whom no other party has any relation. And furthermore, even if Mr. Day succeeds, the present holders in good faith of the new certificates, can none the less succeed against the plaintiff. For indemnity, the

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plaintiff must rely upon the defendants who guaranteed the genuineness of Mr. Day's signatures. With the enforcement of that guarantee neither Mr. Day nor either of such holders has any concern. He brought his suit ; it is in a court of competent jurisdiction ; it will be determined upon correct legal principles ; it will be controlled by the facts which shall be established. He ought not to be prevented by his defendant, a wrongdoer as to him, from trying his own claim in his own suit.

Dillon & Swayne, attorneys, and *John F. Dillon*, *Roger Swayne* and *Edward Patterson*, of counsel for respondent, argued :—I. The jurisdiction which equity had and has of this cause is threefold. 1. As upon a bill in the nature of an interpleader ; 2. To prevent multiplicity of suits ; 3. To prevent irreparable damage. There are two subjects of cognizance in the action. (a) The seven hundred shares of stock and the claims thereto. (b) The dividends earned and not paid over, and the claims thereto.

The plaintiff has actually been sued by Day. Some of the defendants claim title by legitimate transfers, and threaten suits as against the plaintiff to enforce their alleged rights to dividends on the shares, which dividends Day also claims. The claims of the defendants, therefore, are manifestly conflicting, and it is sufficient to maintain a bill in the nature of an interpleader, that a plaintiff is in danger of being molested by conflicting claims (*Prudential Ass. Co. v. Thomas*, *L. R.* 3 *Chy. Ap.* 74 ; *Reid v. Commercial Ins. Co.*, 32 *La. Ann.* 546 ; *Richards v. Salter*, 6 *Johns. Ch.* 445 ; *State Ins. Co. v. Monks*, 1 *Conn.* 691 ; *Salsbury Mills v. Townsend*, 109 *Mass.* 115 ; *Birch v. Corbin*, 1 *Cox Ch. Cases*, 144). That Day claims the shares is obvious—that the parties who caused the transfers to be made insist that Day does not own the shares, is alleged. This controversy is not a shadowy, but substantial one. If the powers are forged no title passed out of Day (*Davis v. Bank of England*, 2

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Bing. 393 ; *Swan v. N. B. & A. Co.*, 2 *H. & C.* 175 ; *Taylor v. Midland R. Co.*, 6 *Juris. N. S.* 595). And if no title passed out of Day, then the parties who caused the transfers to be made are liable to Day (*Marsh v. Keating*, 1 *Bing. N. C.* 198), or to the plaintiff (*Sims v. Am. Tel. Co.*, *L. R.* 5 *Q. B. Div.* 175 ; *Davenport v. Boston & A. R. R. Co.*, 135 *Mass.* ; *Brownell v. Howard F. I. Co.*, 42 *Md.* 384 ; *Hambleton v. C. & O. R. R. Co.*, 44 *Md.* 551 ; *Canal Bank v. Bank of Albany*, 1 *Hill*, 287). Both the holder of the old certificate and the new claim the rights of share owners in the fund as it existed prior to the transfer. Necessarily the claims of both relate to the same share of the fund, and it is equally obvious that each cannot be the exclusive owner of the share. The conflicting rights and interests therefore become patent. And in equity the plaintiff has a right to call upon them to settle that question between or among themselves, and at the same time to settle its own rights by a bill in the nature of a bill of interpleader. That the plaintiff has an interest and calls upon the court to define and protect its rights, and to point out what they are, does not affect the status of the action (*Charmley v. Dunsaney*, 1 *Sch. & Lef.* 137 ; 2 *Ib.* 710 ; *Mohawk & Hudson R. R. Co. v. Clute*, 4 *Paige*, 384 ; *Parks v. Jackson*, 11 *Wend.* 443 ; *Bedell v. Hoffman*, 2 *Paige*, 299 ; *City Bank v. Bangs*, 2 *Ib.* 570 ; *Story's Eq. Jur.* § 824). An injunction goes, as of course, in an action properly framed for an interpleader (*Snell Prin. Equity* [5 ed.], ch. 12, p. 591).

II. The action is well brought as one to prevent a multiplicity of suits. All the claims and rights and interests have the same starting point. They come from the transfer of shares once standing in Day's name and now claimed by him. Those rights and relations which give rise to suits or threatened suits are : 1. Day's claim to ownership. 2. The claims of the parties who caused the transfers to be made, that Day's powers are genuine or were authorized. 3. The claims of the present holders of shares—involving considerations of the *bona fides* of their

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respective titles, and their freedom from the original fraud in transferring out of Day's name, if there were such fraud. 4. The claims of the plaintiffs that if the powers are forged, those presenting the forged powers are liable; or, 5. That if the transfers are merely colorable, and the present holders of shares have no title or a title affected by notice, they must surrender the certificates. All these various claims and rights would necessitate numerous actions if they are to be administered and adjudicated separately. Equity will bring in all parties and have all claims adjudicated in one action (*Third Av. R. R. Co. v. Mayor, &c.*, 54 *N. Y.* 159; *Story's Eq. J.* §§ 852, 854, 901, and notes; *Howe v. Tenants of Broom-grove*, 1 *Vern.* 22; *Mayor of York v. Pilkington*, 1 *At.* 282; *Carroll v. Stafford*, 3 *How. U. S.* 463; *N. Y. & H. R. R. Co. v. Schuyler*, 17 *N. Y.* 573). That a suit is already pending by Day against plaintiff, on his particular claim, adds to the plaintiff's equity (*McHenry v. Hazard*, 45 *N. Y.* 581). Even if there is a good defense at law by the plaintiff to Mr. Day's suit, that does not prevent nor interfere with the granting of the equitable relief sought by this bill (*Scott v. Onderdonk*, 14 *N. Y.* 14; *Ward v. Dervey*, 16 *Ib.* 522; *Wood v. Seeley*, 32 *Ib.* 113; *McHenry v. Hazard*, 45 *Ib.* 580; *Fowler v. Palmer*, 62 *Ib.* 534). It has been suggested that the remedy of the Cable Company is in the exercise of the right to give notice to other parties to come in and defend the original action. This right, and the right to file a bill of interpleader, or a bill in the nature of an interpleader, and to restrain, etc., have existed together too long for one to be now held the exclusive remedy. Besides, the right to give notice to come in and defend, secures merely the negative advantage of estoppel, while we are entitled to ask a decree, affirmatively fixing the rights and liabilities of all the parties. The case of *Prudential Assurance Co. v. Thomas* (*L. R.* 3 *Ch. App.* 74), is an authority against the suggestion.

III. The bill lies to prevent irreparable injury. "A case of irreparable injury to the plaintiff, and one where

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no such injury can be produced to the defendant, is one eminently of equity jurisdiction" (*Brown v. Pacific Mail S. S. Co.*, 5 *Blatch.* 525). The irreparable injury likely to ensue, if Day's suit is not enjoined, is readily pointed out. If Day proceeds to judgment against the plaintiff on the ground of the alleged forgery of the powers, or the alleged fraudulent practices by which the title to the shares was diverted from him, and then the plaintiff seeks to recover against the parties who caused the transfers to be made, those parties would not be bound by the judgment in Day's suit (*Doe v. Earl Derby*, 1 *Ad. & E.* 783; 2 *Smith's Lead. Cas.*, notes, * 669, *et seq.*). Certain of the defendants herein claim and insist that the powers are genuine. If they prove that as against the plaintiff, then the plaintiff would lose twice, and it is exposed to that peril, to prevent which the injunction is asked. In addition to that, the loss of all the costs and expenses of contesting all the various claims that are made to the stock and dividends, and of the institution and defense of the suits the company would have to bring or to resist to maintain its rights, are substantial elements of apprehended and actual damage. Part of the relief prayed for is that if it be adjudged that the shares were transferred on forged powers, such of the defendants as hold certificates so transferred, be required to surrender and deliver them up. This is prayed for in addition to other relief. How far the present holders are *bona fide* holders for value the plaintiff cannot determine. If the original transfers from Day are tainted with crime or fraud, there may be a strong presumption that the infection continues, and if it be so the instruments should be surrendered and canceled. Under such circumstances equitable relief is granted (*Springport v. Teutonia S. Bank*, 75 *N. Y.* 397; *Power v. Village of Athens*, 19 *Hun*, 165). The cases of *Town of Venice v. Woodruff* (62 *N. Y.* 462), and *Buffalo Grape Sugar Co. v. Alberger* (22 *Hun*, 349), are not authorities against the plaintiff. The suggestion that the plaintiff might call upon those who presented the certifi-

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cates of Day for transfer to come in and defend Day's suit, cannot affect the jurisdiction and right of a court of equity to afford relief in a proper case. It is true that certain of the defendants are, by implication of law, guarantors of the genuineness of Day's signature to the powers of attorney—but a court of equity, in the exercise of its jurisdiction, is not restrained by any such consideration, and this would be especially so in a case like the present, in which so many sides are presented of inevitable contest. Besides, it is a matter of very grave doubt as to whether the giving of notice to a surety will bind him by a judgment, unless he has in terms covenanted to be bound by such a judgment upon notice to him to come in and defend (*National Fire Insurance Co. v. McKay*, 5 Abb. N. S. 448 ; *Thomas v. Hubbell*, 15 N. Y. 407).

Bergen & Dykman, attorneys, and *Benjamin F. Tracy* and *Wm. N. Dykman*, also argued on behalf of respondents, *DeWolf* and *Swan*.

BY THE COURT.—SEDGWICK, Ch. J.—I am of opinion that the order appealed from should be reversed. The defendant Day, in bringing the action against the plaintiff, exercised a legal right. The action should not be stayed, unless the plaintiff discloses some equity in its favor.

There is no such equity as is based upon principles that sustain actions of interpleader or in that nature. For the alleged perplexity as to the defendant to whom the right, supposed to be in question, belongs, or the danger of being obliged to satisfy the claims of opposing parties, has not arisen without fault on plaintiff's part, but has arisen from an act done voluntarily and advisedly by itself. Its duty towards defendant Day, not to issue a certificate of his shares to another without authority, was absolute. When it did, it is supposed that it was in possession of all the proofs that were necessary to show without doubt that its action was justified. If it omitted any care or caution, or did not use means it legally might, the consequences

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should equitably fall upon itself. The plaintiff should not now seek a determination as to whether it was right or wrong, by compelling Day to litigate with the other parties. Indeed, there could be no such litigation, for first and last, so far as Day is concerned, the litigation would be between him and the plaintiff.

In accordance with like considerations, a party charged with a tort in the conversion of property, cannot, except a statute provide for it, interplead the person making the charges with others claiming adversely to him, under whom the party charged acted.

There is not shown to be any danger of vexatious actions or suits in the proper sense of that term. In fact, the complaint does not show that those defendants whose claims are alleged to be at variance with the claim of Day, threaten the plaintiff with any suit whatever. Those defendants are in possession. They are content with things as they are. Perhaps the contingency may never arise, that would make it for their interest to bring any action. They certainly would not bring any action if the plaintiff can justify its action in transferring its shares, and as has been said, it is legally bound to be prepared to justify if it can. It would seem that there could arise no litigation, until the plaintiff is forced to the position of having violated a duty as to Day. Therefore, there is no equity based upon the avoidance of a multiplicity of actions, if that of itself constituted an equity, which it does not.

I am of opinion also that the supposed differences or anticipated issues, between the plaintiff and the various defendants, are not *ad idem*. The plaintiff has, and under the complaint will have the stock, shares in which belong either to Day or to some of the other defendants. The defendants do not claim that stock, and the plaintiff claims no interest in the shares. The defendant Day makes only the claim that the plaintiff shall return to him as his property, the certificate which the plaintiff took when it transferred his shares apparently,

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and shall recognize him as shareholder. The other defendants may, at some time, resist the plaintiff's refusing to recognize them as shareholders, or its endeavor to cancel their certificate of ownership. The issues, whenever made, will not regard the same thing, although a controlling piece of evidence may be the falsity or genuineness of Day's signature to the authority to transfer. I therefore think that the complaint is multifarious.

The order should be reversed, with costs.

O'GORMAN and INGRAHAM, JJ., concurred.

RAMON MONNÉ, ET AL., APPELLANTS, v. FREDERICK F. AYER, ET AL., RESPONDENTS.

Reformation of instrument—representations of legal effect.—Joinder of actions.—Damages recoverable in action for reformation.

A false declaration of the legal purport and effect of an instrument is a sufficient ground for its reformation—*e. g.*, a lessor, on his attention being called, by the lessee, to the omission, from a proposed written lease, of sundry provisions which formed part of the oral agreement, in execution of which the written lease was to be made, represented that it was a matter of no importance, because the provisions had been previously agreed on and such previous agreement would not be affected by the execution of the lease; believing and relying on which statement the lessee executed the lease. *Held*, a proper case for reformation. There was either a mutual mistake, or mistake on one side and fraud on the other.

Wilson v. Deen, 74 *N. Y.* 531, distinguished.

Damages for breach of instrument when reformed may be sued for and recovered in the action for reformation.

Before TRUAX and O'GORMAN, JJ.

Decided May 26, 1885.

Appeal from judgment in favor of defendants dismissing the complaint on the merits, entered upon an order made on the trial of an issue of law raised by a demurrer to the complaint, sustaining the demurrer and ordering final judgment of dismissal of the complaint.

Appellants' points.

The facts appear in the opinion.

Wingate & Cullen, attorneys, and *George W. Wingate*, of counsel for appellants, argued:—I. The complaint alleges, that when the plaintiffs objected to the omissions before the lease of the covenants agreed upon (as to repairs and steam), the defendants stated "that this was a matter of no importance; that as it had been previously agreed upon it would not be affected by the execution of the lease presented." This justifies a court of equity in reforming the contract (*Maher v. Hibernian Insurance Co.*, 67 N. Y. 289; *Warren v. Sandborn*, 82 *Ib.* 604). The rule is, that equity will reform a written instrument in cases of mutual mistake, and also in cases of fraud, and also where there is a mistake on one side and fraud on the other (*Hay v. State Fire Insurance Co.*, 77 N. Y. 240; *Welds v. Yates*, 44 *Ib.* 525). The rule that there must be a mutual error to authorize the interposition of a court of equity, only applies where the element of honesty exists on the part of the one correctly understanding the contract. It does not apply where there is a fraud (*Gillon v. Borden*, 6 *Lans.* 219).

II. It is immaterial that the statements made by the plaintiff in regard to the effect of the omissions of the clauses in question from the lease were as to matters of law (*Cook v. Nathan*, 16 *Barb.* 342; *Johnson v. Hathorn*, 2 *Abb. Ct. App. Dec.* 469; 2 *Keyes*, 484; *Barker v. Clark*, 12 *Abb. U. S.* 115). Fraud, in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and which are injurious to another, or by which an undue and unconscientious advantage is taken of another (*Gale v. Gale*, 19 *Barb.* 249).

III. The defendant cannot allege that the plaintiffs were guilty of laches in believing his statements (*Albany City Savings Bank v. Burdick*, 87 N. Y. 404; *Mead v. Bunn*, 32 *Ib.* 280).

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IV. The action was properly brought for a reformation of the lease, and for the recovery at the same time upon it, when reformed (*Maher v. Hibernia Insurance Co.*, 67 N. Y. 292; *N. Y. Ice Co. v. Northwestern Insurance Co.*, 23 *Ib.* 357).

V. The court below erred in holding that the preliminary contracts were merged in the lease. (a.) The agreement to furnish steam being upon an independent consideration, *i. e.*, the payment of the cost for what was used, was an independent agreement, and not within the rule (*Lewis v. Seabury*, 74 N. Y. 409; *Ersine v. Adams*, L. R. 8 Ch. App. 736; *Morgan v. Griffith*, 6 *Erch.* 70). (b.) The same principles apply to the claim for damages caused by the landlord's failure to fix the steam pipes.

L. H. Babcock, attorney, and of counsel for respondents, argued:—I. There is no ground for the intervention of a court of equity to reform this lease. This is not a case of mutual mistake, or mistake on one side and fraud on the other. There was no mistake on either side, but both parties executed the lease with full knowledge of its contents. "The parties having agreed to the form of the lease as it was, no action for its reformation lies" (*Wilson v. Deen*, 74 N. Y. 531; *Johnson v. Oppenheim*, 55 *Ib.* 280; *Bryce v. Lorillard Fire Ins. Co.*, 55 *Ib.* 240).

II. Courts of equity refuse to grant relief for ignorance or mistakes of law (*Kent v. Manchester*, 29 *Barb.* 595; *Carpentier v. Minturn*, 6 *Lans.* 56; *Story Eq. Jur.* §§ 111-114; *Jacobs v. Morange*, 47 N. Y. 57).

III. The stipulations set forth in the complaint as having been made by the respondents prior to or at the time of the lease, furnish no grounds which this court can take cognizance of for its reformation, by inserting such stipulations therein. This is settled in the case of *Wilson v. Deen* (74 N. Y. 531), where the court says: "The current of our authorities sustains the proposition that both at law and in equity, one who sets his hand and seal to a written instrument, knowing its contents, cannot be permitted to set up that he did so in reliance upon some ver-

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bal stipulation, made at the time, relating to the same subject, and qualifying or varying the instrument which he thus signs. The very purpose of the rule which excludes evidence of such declarations is to avoid the uncertainties attendant upon such evidence, and equity will not set aside that important and well settled rule, for the purpose of relieving a party against a risk, which, upon his own showing, if it be true, he has voluntarily incurred. It is only when, through fraud or mistake, a party has executed an instrument which he believes to be in accordance with the real agreement, but which is in fact different, that equity will relieve; and even then the mistake, as well as the agreement, must be made out by clear proof."

IV. There is no charge of fraud which would justify, under any circumstances, the interference of a court of equity. The principle of *Long v. Warren* (68 N. Y. 426), applies. This is not like the case of the Albany Savings Institution v. Burdick (87 N. Y. 40), cited by plaintiffs at special term. There the person to whom the plaintiff had intrusted the drawing of a deed had, without her knowledge or consent, inserted a clause by which she assumed the payment of a mortgage. The court held that she was not chargeable with negligence in not reading the deed, because she had a right to confide in her agent. But Monné Bros. do not stand in such a position. They were one of the parties to a business transaction, viz., the purchasers of a lease, and were governed by the rules laid down in *Long v. Warren* (*supra*).

BY THE COURT.—TRUAX, J.—The complaint alleges that plaintiffs and defendants had had negotiations relating to plaintiffs' hiring a certain building from defendants; that during the negotiations, plaintiffs promised to take a lease of the building, provided the defendants would do certain repairs, and would furnish plaintiffs with steam for the building; that defendants agreed to do the repairs and to furnish the steam; that defendants presented plaintiffs a lease which did not contain the

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covenant to make the repairs and furnish the steam ; that plaintiffs called defendants' attention to that fact ; that defendants said that it was a matter of no importance, because the matter had been previously agreed upon between the parties, and such previous agreement would not be affected by the execution of the lease ; that plaintiffs relied upon said statement and executed the lease ; that defendants refuse to do the repairs and furnish the steam, that plaintiffs have done the repairs at an expense to them of \$500, and that they have been damaged to a large amount by the neglect and refusal of the defendants to furnish steam ; and the complaint demands that the lease be reformed by inserting therein provisions for the repairs and steam, and that plaintiffs recover damages for defendants' breach of the lease, as it will be after it has been reformed.

To this complaint the defendants demurred, on the ground that it does not state a cause of action. The demurrer was sustained by the special term.

The acts of the defendants in representing to plaintiffs that it was not necessary that the lease should contain a covenant relating to repairs and steam, may be looked at in two lights. It may be that defendants really believed that it was not necessary that the lease should contain the covenant, or it may be that they knew that the lease must contain the covenant in order to bind them, and that they misled plaintiffs for the purpose of obtaining a more advantageous leasing of the premises.

If the lease was entered into because of the belief first above stated, it was a mutual mistake which would warrant the court in reforming the contract. If it was entered into because of the reason last above stated, it was a fraud on the plaintiffs, and the contract should be reformed (*Welles v. Yates*, 44 N. Y. 525, and cases there cited ; *Waring v. Somborn*, 82 *Ib.* 604).

This case is to be distinguished from *Wilson v. Deen* (74 N. Y. 531). In that case, the covenant on the part of the landlord was not inserted in the lease, because the plaintiff did not think it necessary to have it inserted. In

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this he was mistaken ; but the defendant did nothing to deceive or mislead him. While in the case at bar, plaintiffs relied upon the erroneous information given by defendants.

It is true, the defendants did not induce plaintiffs to believe that the deed, as a matter of fact, contained the agreement to make repairs and furnish steam, but they did induce plaintiffs to believe that it was not necessary that the lease should contain such an agreement. There was mistake on both sides, or there was mistake on one side and fraud on the other. Either is ground enough for reforming the agreement (*Waring v. Somborn*, *supra*). A false declaration of the legal purport and effect of a deed will render it voidable, whether the misstatement had its origin in a wish to deceive, or in the mistaken belief of him who made it (*Broadwell v. Same*, 1 *Gilman*, 899 ; *Tyron v. Passmore*, 2 *Barr*, 122 ; *Snyder v. May*, 7 *Harr.* 239 ; *Edwards v. Brown*, 1 *Tyrwhit*, 182 ; *Chesnut Hill Reservoir Co. v. Chase*, 14 *Conn.* 123 ; *Jordan v. Stevens*, 51 *Me.* 78 ; *Fillman v. Curtis*, 15 *Ib.* 140 ; *Cooper v. Phibbs*, *L. R.* 2 *H. L.* 149 ; *Broderick v. Same*, 1 *P. Wms.* 239).

It is settled in this state that one may bring an action to reform a contract, and in the same action may recover damages for the breach of the contract as it is after it has been reformed (*New York Ice Co. v. N. W. Ins. Co.*, 23 *N. Y.* 357 ; *Maher v. Hibernia Ins. Co.*, 67 *Ib.* 283 ; *Welles v. Yates*, 44 *Ib.* 531, and cases there cited).

The order and judgment appealed from are reversed with costs, and the demurrer is overruled with costs, with leave to the defendants to withdraw demurrer and answer on payment of costs.

O'GORMAN, J., concurred.

Statement of the Case.

ANDREW RANDALL, APPELLANT, v. JOHN B.
REYNOLDS, RESPONDENT.

Parties to contract—Effect of settlement on rights of prior assignee—What particulars of instrument of settlement explainable.

Where a contract provides for the payment to A. of commissions, if the sale of certain real estate be effected, and also provides that the purchaser may be found by A. or B., the agreement cannot be deemed an original contract with B., and he must recover, if at all, as assignee of A.

A valid settlement of a claim for commissions, as above made, between the parties, for value, is binding on a prior assignee of the claim, where the debtor has not been notified and is ignorant of said assignment at the time of the settlement.

A receipt may be explained as to the consideration part, when the explanation is not inconsistent with the instrument; but so far as it is a contract having a settlement or release for its object, it cannot be varied or explained verbally—and this, whether the paper be sealed or not.

A paper acknowledging the receipt of \$500 "in full of all matters from the beginning of the world to this date," is not to be limited to any particular claim, unless, in addition to the general words, a particular claim be specified.

Before SEDGWICK, Ch. J., and TRUAX, J.

Decided June 1, 1885.

Appeal by plaintiff from judgment dismissing complaint on the merits, entered on direction of judge at trial term before a jury.

The complaint averred, and the answer admitted the making of the following contract, in writing: "If I sell my iron ore mine known as the McIntyre bed, in town of Livingston, Col. Co., N. Y., to a party, through the efforts of Andrew or John L. Randall, or to parties introduced by them, for \$125,000, I hereby agree to pay to John L. Randall, five per cent. commission on said sum, and I further agree to pay two and one-half per cent. (if I sell for a less sum), on the sum that I may sell at, it being understood that the said Randall shall study my best interest, and communicate fully and freely with me during the negotiations."

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It was further averred that the plaintiff brought one Louis Snyder and the defendant together; that the defendant thereupon agreed with Snyder to sell and convey the property to Snyder, or such person as he should designate; and that, in consequence thereof, a conveyance was made to parties designated by Snyder, in consideration of \$100,000 paid to the defendant; that "the purchase and sale aforesaid was brought about and perfected by the efforts, negotiations, work and labor of the plaintiff and his assignor, hereinafter mentioned, and in pursuance of the said proposition in writing, executed and delivered by the said defendant; that on March 3, 1883, John L. Randall assigned all his right, title, and interest in and to said agreement to plaintiff, and he is now the only party entitled to commence and prosecute these proceedings, or interested therein."

On the trial, it appeared that on March 5, there was a settlement between John L. Randall and the defendant, of some matters indefinitely described by John L. Randall, as a witness on the trial. In consummation of that settlement, the defendant paid John L. Randall, \$500, and the latter gave the following instrument: "Received of J. R. Reynolds, \$500, in full settlement of all matters between us, from the beginning of the world to this date, except San Juan matter and the letter sheet matter, under control of V. G. Gaskill and said Reynolds. John L. Randall."

The plaintiff gave testimony for the purpose of showing that he did what was intended by the contract to be the condition of payment to John L. Randall.

At the end of plaintiff's case, the judge dismissed the complaint, delivering the following opinion:

"FREEDMAN, J.—The facts of this case are very peculiar. By the written contract set out in the complaint, and into which all verbal negotiations must be deemed to have been merged, the defendant promised to pay only to John L. Randall. It was within the contemplation of

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the parties that either Andrew Randall or John L. Randall might procure a purchaser, but in either event the compensation was to go only to John. Andrew, the plaintiff, can only recover, therefore, as the assignee of John. He proved an assignment to himself from John, dated March 3, 1883, but of this he gave no notice to the defendant, nor is there any evidence from which constructive notice could be found. Two days later, namely March 5, 1883, the defendant and John, between whom other matters were pending, effected a settlement. John received \$500, and in consideration thereof he executed and delivered to the defendant a receipt in writing, acknowledging the receipt of \$500 in full settlement of all matters between them from the beginning of the world to the date of the receipt, except two matters specially mentioned, of which the matter involved in the present suit was not one.

“This agreement binds the plaintiff, because he failed to give notice of the assignment to him (*Finch v. Parker*, 49 N. Y. 1; *Van Keuren v. Corkins*, 66 *Ib.* 77; *Heermans v. Ellsworth*, 64 *Ib.* 159). If such notice had been given, it is but fair to assume that the defendant would not have paid the \$500.

“Before arriving at this conclusion, I did not overlook that a receipt may frequently be explained. The rule is that it may be explained as to the consideration part, when the explanation is not contradictory to, but consistent with the instrument. So far as a receipt is in the nature of a contract, it falls within the general rules applicable to contracts, and its terms cannot be varied by parol testimony, except in a proceeding to reform the instrument for fraud or mistake (*Coon v. Knap*, 8 N. Y. 402).

Hugo Hirsh, for appellant.

Edward S. Hatch, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—I am of opinion

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that the learned judge rightly dismissed the complaint on the ground taken by him.

It is argued in opposition, that the testimony of John L. Randall showed that the matter which was settled by the contract in the so-called receipt, did not comprehend any reference to the matter in action here. If any part of the receipt was a contract, or of that nature, having a settlement or release as its object, it could not be explained verbally. The words unambiguously referring to "all matters between us," are not to be explained verbally, and not to be restrained to any particular claim or claims, as they might be, if, in addition, a particular claim had been specified (*Russel v. Rogers*, 10 *Wend.* 473 ; *Hoes v. Van Hoesen*, 1 *B. Ch.* 380 ; *Van Brunt v. Van Brunt*, 3 *Ed.* 14). These cases refer to instruments under seal, but their principle is applicable to any composition or settlement based upon contract for consideration, where the parties have a difference that is not merely colorable.

The learned judge, in refusing to take the ground that the plaintiff had not shown that John L. Randall himself had ever had any cause of action, was too favorable to the plaintiff. This was, no doubt, due to mere intimation of important facts contained in a mass of testimony that did not sustain plaintiff's case. The matter is clear when the testimony is examined in a printed form. The plaintiff was to show that he had brought about the sale, or had introduced the purchaser to the defendants. He testified that John L. Randall had not done anything towards either of these things. It is not necessary to give much of the evidence. The plaintiff put upon the stand all the witnesses whose testimony will be alluded to. It was clear that unless Louis Snyder represented in some way the parties who afterwards bought, or was an efficient agent in bringing about the sale, the plaintiff was not entitled to recover ; for the whole that the plaintiff did was to bring Snyder in communication with the defendant, and assist in negotiations between them. Snyder, as a witness for plaintiff, testified that he acted in the mat-

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ter by the instructions of R. S. Grant, and that he did not know whom R. S. Grant represented. Mr. Grant, as a witness for plaintiff, testified that he directed Snyder to purchase the property for \$40,000 or \$50,000 if he could. He reported that he could not, and that ended the matter with the witness. He further testified that the property was subsequently purchased by no interest that he represented, and that it was purchased in the interest of the Hudson River Ore & Iron Co., and he was not familiar with the details of the transaction. The plaintiff's witness therefore proved that the plaintiff did not bring about the sale. There were many facts shown that created an expectation that further facts would be shown to connect the efforts of Snyder with the sale, but these were not proved. Beyond this, the plaintiff's brother testified to several admissions of defendant in conversation, that might have made it necessary to find what the admission proved, if the plaintiff had not, as he did, called as a witness in his own behalf the defendant, who so fully denied that he made the admissions in part, and explained the rest, that the jury could not have found for plaintiff on this part of the case. I intend to speak of this case only, and not to imply that there should be a similar result in every case where there is a conflict of the same general kind. In brief, the plaintiff showed no cause of action.

Judgment affirmed, with costs.

TRUAX, J., concurred.

Statement of the Case.

THOMAS FOX, RESPONDENT, v. MATTHEW BYRNES,
APPELLANT.*Contract for commissions on sale or exchange of real estate.*

Where a contract is made to pay a broker commissions on sale or exchange of real estate, a change of ownership in the property described in the contract, during the negotiations, followed by the exchange contemplated, does not necessarily release defendant, the contracting party, from payment of the commissions contracted for; nor does the fact that the negotiations were not successful at first, and were declared by defendant to be terminated, provided they are continued by defendant and are successful.

In the case at bar, at the time of the employment of plaintiff as broker, defendant owned real estate, the subject of the contract, and requested the plaintiff, who had found a person willing to bargain with defendant, to tell him who was his principal, and he (defendant) would attend to the balance himself, and would pay plaintiff his full commissions if he made the exchange. Plaintiff introduced to defendant one S., and defendant, after negotiations for the exchange, which up to that point did not result in an agreement, told plaintiff that no exchange could be made; that it was all off, etc. Shortly thereafter, defendant with his son sought S. and told him that he had given his property to his son, and if he (S.), was for making a deal, he should make it with his son. Defendant actively participated in the negotiations, and a contract was drawn by him between S. and the son, and the matter consummated.

Held, that the consideration for such a contract need not be a benefit to the promisor; it is enough if it is some detriment, expense, trouble to or service by another. Therefore, the fact that in the course of the negotiations the defendant gave the property to another, would be immaterial, the plaintiff having found a person who finally made the exchange through the negotiations of the defendant.

Further held, that the gift of the property to the son, before the completion of the exchange, did not incontrovertibly prove that the exchange was not such as was contemplated by the contract, since it might have been the intention of defendant to procure for him through the efforts and service of the plaintiff, the additional advantage of a profitable exchange.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided June 1, 1885.

Appeal by defendant from judgment entered on verdict for plaintiff, and from order denying motion for a new trial made upon the minutes.

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The action was for compensation promised to be paid by defendant to plaintiff, for procuring a person willing to exchange real estate, under a special contract.

The facts appear in the opinion.

William H. Arnoux, for appellant.

Samuel A. Noyes, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—There was testimony in the case which would uphold a verdict, that the following facts existed: The defendant employed the plaintiff as a broker to find a person who would buy or exchange real estate for real estate that was specified. At the time of the employment, the latter real estate was owned by the defendant. The plaintiff found Mr. Spaulding, who, he believed, would finally make a bargain with defendant. The defendant said to the plaintiff, "Any trade you make for me I will pay you full commissions, the usual commission." He asked who the plaintiff's principal was. He wanted the plaintiff to tell him who the principal was and he would attend to the balance himself; he would attend to it, and pay the plaintiff full commissions. The plaintiff introduced Mr. Spaulding to the defendant. Afterward, the defendant and Mr. Spaulding carried on negotiations as to the exchange, which, up to a certain point, did not result in an agreement. The plaintiff took no part in them. The defendant met the plaintiff and said to him, "Oh, I will have no more to do with that—you cannot make a trade—won't touch it at all—won't have anything to do with it." During much of the negotiation between Mr. Spaulding and defendant, the son of the defendant was present. At the point referred to, the defendant, while his son was present, said to Mr. Spaulding, "It is all off. I cannot make a trade." A day or two afterwards, the defendant and his son went to the house of Mr. Spaulding. The defendant then said that he had given his property to his son, and if Mr. Spaulding "was making any deal, I should make it with his son."

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At once negotiations as to an exchange proceeded, in which the defendant actively participated. A conclusion was reached that night. The contract for the purchase was drawn by the defendant.

Undoubtedly, if the contract had been made while the property remained in the defendant, he would have been liable for the commission of plaintiff. Now, was it an impossible thing that the defendant should be bound by a promise to pay commissions to plaintiff, if the latter should find a person willing to take the property in exchange, the defendant not being, nor ever having been an owner of the property, the defendant undertaking to carry on the negotiations with the person found by the plaintiff? To sustain a contract a consideration need not be a benefit to the promisor, and it is sufficient if it be a detriment or some expense to the promisee. If such were the nature of the contract, it would be immaterial that, having been owner, the defendant, in the course of the negotiations that finally led to the exchange, gave the property to another. The condition would be complied with; the plaintiff would have found a person that through the negotiation of defendant, exchanged finally property for the property described in the contract of employment.

The fact of the defendant giving the property to his son, did not incontrovertibly prove that an exchange while in the hands of the son was not such as was contemplated by the contract of employment. It may have been within the intention of the defendant, besides giving the property to the son, to procure for him, through the efforts of the plaintiff, the additional advantage of having an opportunity to make a profitable exchange.

There was enough evidence, under the views that have been expressed, to take the case to the jury. The court was not in error in refusing to dismiss the complaint.

The counsel for defendant excepted to that part of the charge of the court which submitted to the jury whether the plaintiff found a purchaser for the property of the defend-

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ant, because the undisputed evidence of Mr. Spaulding and of the defendant and his son was that they declared the contract off. The exception does not seem to have been well taken, for, whatever the declarations of these gentlemen may have been, the statement of fact shows that the jury could have found that the negotiations went on unbroken, as substantially carried on by the defendant, until the final exchange.

The following exceptions should be considered. One was to a refusal to charge that if the deed to the defendant's son was executed and delivered to him on May 13, and no previous agreement had been made, meaning undoubtedly no agreement for an exchange, plaintiff cannot recover. If what has been said as to the liability of the defendant not depending upon his having remained owner, if the contract of employment did not contemplate that he should, be correct, the court was right in refusing the request.

The same is true of another request, that unless the jury find that the transfer to defendant's son was a device or trick, their verdict cannot be for defendant. The defendant may have contracted to be bound for the finding of a person willing to exchange for the said property conveyed to him by his father, *bona fide*.

The defendant's exceptions as to the ruling of the court, in admitting or rejecting evidence have been particularly examined. No testimony injurious to defendant was improperly admitted, and none that would have been of advantage to him, was improperly excluded.

Judgment and order appealed from, affirmed, with costs.

FREEDMAN, J., concurred.

Statement of the Case.

THERESA SALOMON v. BRYAN LAWRENCE.

Specific performance of contract for purchase real estate.—Will, construction of—trusts—words “request” and “confidence.”

A clause in testator's will read as follows : “I give, devise and bequeath to my beloved wife, Theresa King, all my estate, both real and personal, of every nature and kind whatsoever, and wheresoever situated, *to have and to hold the same to her and her heirs in fee*, having full confidence that my said wife will make proper and suitable provision for our son, Henry A. King. And *I request* that out of the estate hereby devised to my said wife, she will not only thoroughly educate and maintain my said son Henry A. King, but that upon his arriving at majority, she will establish him in business out of the estate hereby devised to her. I appoint my said wife the guardian of my said son, and of his estate during his minority.”

Held, that whether or not the language creates a trust, it was not the intention of the testator to limit the power of his wife to dispose of the real estate devised, but it was his intention that she should have the same power to sell that any owner of property in fee has.

Further held, that defendant's assignor, having contracted with her to purchase the property, judgment should be in her favor for specific performance.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 1, 1885.

Submission of an agreed state of facts, under section 1279 of the Code of Civil Procedure.

Theresa Salomon and one Cohen made a written contract for the sale and purchase of real estate. Theresa Salomon was by it to make a conveyance to Cohen or his assignees, “of the fee simple of the said premises, free from all incumbrances.” Cohen assigned to Bryan Lawrence. On the day for performance Theresa Salomon tendered performance to Lawrence. Lawrence declined to receive the performance tendered, on the ground “that under the last will and testament of Anthony King, the said Theresa Salomon did not take, a complete and absolute title in fee simple in and to the premises described

Plaintiff's points.

in the contract aforesaid ; inasmuch as Henry A. King, had a vested right or interest in said premises, and the same were charged for his proper and suitable provision, education and maintenance, and establishment in business at his majority, and that under the said will a trust arose in favor of said Henry King."

The facts to which this objection referred, were as follows : Theresa Salomon, being then a married woman, claimed title under the will of her former husband, Anthony King. Henry King was the only child of Anthony and Theresa. The parts of the will that relate to the controversy are as follows : "I give, devise and bequeath to my beloved wife Theresa King, all my estate, both real and personal, of every nature and kind whatsoever, and wheresoever situated, to have and to hold the same to her and her heirs in fee, having full confidence that my said wife will make proper and suitable provision for our son, Henry A. King. And I request that out of the estate hereby devised to my said wife, that she will not only thoroughly educate and maintain my said son Henry A. King, but that upon his arriving at majority, she will establish him in business out of the estate hereby devised to her. I appoint my said wife the guardian of my said son and his estate during his minority."

The court was asked to determine whether there should be judgment in favor of Theresa Salomon, that Lawrence specifically perform the contract according to its terms, or judgment for Lawrence that Theresa is not entitled to specific performance, and also that she pay him \$500, an amount paid on the contract at its signing and delivery.

Julius J. & A. Lyons, for Theresa Salomon.—I. It being a rule of law that any devise or gift which may be repugnant to a former devise or gift must fail and give way to the first devise in fee, the expressions of "confidence" and "request," contained in the said will of Anthony King, do not create a trust in favor of said

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Henry A. King, nor do they divest the plaintiff of her title to the property devised to her in fee (*Parson v. Best*, 1 *S. C. R. T. & C.* 211; *Foose v. Whitmore*, 82 *N. Y.* 405; *Re Hutchinson*, tenant, *L. R.* 8 *Ch. Div.* 540; *Clark, Exr., v. Leupp, Imp.*, 88 *N. Y.* 228; *Mackett v. Mackett*, *L. R.* 14 *Equ. Cas.* 49. See also *Campbell v. Beaumont*, 89 *N. Y.* 464; *Helmer v. Shoemaker*, 22 *Wend.* 137; *Cohen v. Cohen*, 4 *Redf.* 49; *Jackson v. Bull*, 10 *Johns.* 19; *Colton v. Stenlake*, 12 *East*, 514; *Downey v. Bordon*, 36 *N. J. L.* 460; *McKenzie's Appeal*, 41 *Conn.* 607; *Hurler v. Jenks*, 43 *Penn.* 445; *Kerbert v. Thomas*, 3 *Ad. & L.* 123; *Sale v. Moore*, 1 *Simons*, 534; *Webb v. Wools*, 2 *Simons N. S.* 267; *Gebler v. Chapin*, 19 *Conn.* 342; *In re Pennock's Est.*, 20 *Penn.* 268).

II. If any trust in favor of Henry A. King was created by the will of Anthony King, we claim it is void, as it is uncertain, indefinite and ambiguous; while the object and purposes thereof may be expressed, the amount or portion of the estate to be so expended for support and maintenance are not. It is not shown whether the income or capital is to be used therefor, and as to the establishment of said Henry in business, there is no direction as to what portion, if not all of the estate, is to be so used. The absence of these necessary directions show that it was not the intention of the testator in any way to limit his wife's title in fee, for, in both instances where he suggests and requests, he repeats that he has given and devised the estate to her.

III. Whatever cases there may be when a request has been converted into a trust the former estate has been a life estate, and not one in fee.

John E. Develin, for Bryan Lawrence.—The words in the devising clause of the will, viz.; “having full confidence that my said wife will make proper and suitable provision for our son Henry A King, and I request that,” limit the general words of the gift and devise to her, and engraft a trust upon it. (a) The cases are numerous in

 Defendant's points.

which the words "having confidence," "I request," or words similar in substance, following a devise, have been held to create a trust (1 *Jarman Wills*, 680 ; *Perry Trusts*, § 112 ; *Story's Eq. Juris.* §§ 1068-1068 (a) ; *Wright v. Atkins*, 17 *Ves.* 255 ; *Vandyck v. Van Beuren*, 1 *Cairnes*, 84 ; *Massey v. Sherman*, *Amb.* 520). (b) To give effect to a direction of this description all that is required by law is that the language employed to express it shall indicate it to have been the intention of the testator that it should certainly be observed and carried into effect (*Lawrence v. Cooke*, 32 *Hun*, 126). (c) Added to this, it may be said that the person and object of the trust should be certain (*Wright v. Atkins*, *supra* ; *Burt v. Herron*, 66 *Penn.* 400).

II. Both the person and object are here plainly pointed out. The person was his son, the object, the education and maintenance of this son, and his establishment in business after arriving at age. The latter object may or may not be too general, but the former (education and maintenance) are direct and certain and could be enforced by the court. Every implication is in favor of the heir, and all parts of the will, even where some may be invalid, are to be taken and considered together, to facilitate its interpretation and ascertain the intention of the testator (*Van Kleeck v. Dutch Church*, 20 *Wend.* 469 ; *Tucker v. Tucker*, 5 *N. Y.* 408). The confidence and request do not form an independent clause inconsistent with, but give direction to the devise. They form part of the substance of the devise, and the case is thus taken out of that class of decisions which hold that an absolute devise in fee may not be diminished or limited by subsequent clauses in the will which merely cast a doubt upon it, such as *Clark v. Leupp*, 88 *N. Y.* 228, 231 ; *Campbell v. Beaumont*, 91 *Ib.* 464, 468 ; *Freeman v. Coit*, 96 *Ib.* 63, 69. The case under consideration does not differ from a will by which an estate is devised in fee with the additional and positive words immediately following : "In trust nevertheless," &c. Here, instead of formal words being used, the trust

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is created by informal but sufficient words (1 *Perry Trusts*, §§ 83, 112, 114). The words of the will, the surroundings of this case, of the reason and of the object of the testator's "request," his duty to his offspring as well as his natural affection, and the implication of law in favor of the heir and against his disheirson, all unite in bringing the case within the decisions, which hold that the phraseology here used creates a trust.

BY THE COURT.—SEDGWICK, Ch. J.—In such cases, when the determination depended alone upon the force of the use of the words "confidence" and "request," it has been held that they impose an obligation upon the devisee as to the property devised, in favor of the person contemplated by the testator. There are several matters in the present case, that tend to such a result. Henry King was the only child of the testator, whose will made no other provision for him than is made by the provisions now under construction. It is, moreover, within the range of the considerations appropriate to such a case, to inquire whether the testator, in referring to the "estate" of his son, of which, during his minority, he made the mother and devisee the guardian, did not refer to such an estate as the son might have if the devisee responded to the confidence and performed the request of the testator. Of course, before finally determining that there was what is called a trust, it would be necessary to examine other things which look in a different direction. Arguments that by themselves are favorable to the position that there is a trust for the son, have been alluded to to prevent any supposed implication from this decision of an opinion that the son has no interest in any form; and on the other hand there is no intention to intimate what is the nature or form of that interest, if it exists, excepting so far as it may be necessary to say, that whatever it is, it is not inconsistent with the capacity of Theresa Salomon to convey a fee of the real estate. Such a result would follow an ascertainment that the testator intended that in keep-

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ing his confidence and performing his request, the wife should have legal capacity to sell the fee.

The testator did not describe the method of applying the property to the advantage of the son in the respects specified by the will. Generally, where there is a trust created by giving the legal title of property to a trustee for a *cestui que trust*, there is a provision made for selling the specific property, and substituting in its place the proceeds. If such a provision were not made, the result would be, that only the property itself or the income from it, could be applied to the benefit of the *cestui que trust*. To give the power to sell it is not necessary that express words be used. It may be implied from circumstances, and the object of the exercise of the power (1 *Hill on Trusts*, 686; 2 *Spencer Eq.* 366; *Morton v. Morton*, 8 *Barb.* 18; *Dorland v. Dorland*, 2 *Ib.* 63; *Bogert v. Hertell*, 4 *Hill.* 492).

The object of the favorable intention of the testator in reference to the son, could be accomplished without making the estate in fee in the devisee inalienable. So far as the expression went, it could be accomplished by devoting a necessary part of the personal estate, or the proceeds of a sale of the real estate. Whatever might be supposed to be the interest of the son as to any part of the estate, the devisee had an absolute fee simple in the rest, unincumbered with any trust. The devisee would, from the nature of the acts expected of her, towards her son, be meant to have some discretion, as much as a parent would have in applying her means to the education and maintenance, and the setting up in business of a son. The kind of disposition of the estate to the wife, implies that she was not to be limited to keeping the property devised to her in fee, in the form in which it was upon the testator's death.

I am, therefore, of opinion that it was not the intention of the testator to limit the devisee's power of disposition, and it was the intention that she would have the same power to sell that any owner of a fee has.

The judgment should be in favor of Theresa Salomon

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for specific performance. The form of the judgment is to be settled upon notice.

FREEDMAN and TRUAX, JJ., concurred.

CHRISTOPHER B. KEOGH, ET AL., v. STEPHEN A. MAIN, APPELLANT, AND THOMAS MULRY, ET AL., RESPONDENTS.

Stipulation—when may be set aside on motion.

When a stipulation given in an action has the force of a contract between the parties, it should not be set aside, except upon such clearly disclosed equitable grounds as would authorize the amendment of any contract.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 1, 1885.

Appeal by a defendant from an order setting aside a stipulation made between him and a co-defendant.

The facts appear in the opinion.

Jones & Roosevelt, for appellant.

William P. Mulry, for respondents.

BY THE COURT.—SEDGWICK, Ch. J.—The defendant Main was the owner of a house and lot in the city. This proceeding was begun to foreclose an alleged mechanic's lien upon that real estate. The Mulrys were made defendants as claiming a mechanic's lien upon the property. After this proceeding was begun, there was pending in the marine court a personal action against Main, brought by one Leslie, for work, labor and materials done by the Mulrys for Main, as alleged. This work, &c., was the same for which the Mulrys claimed a mechanic's lien in this proceeding. Before the defendant Mulrys had interposed an answer claiming a mechanic's lien against

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defendant Main, the following stipulation was made : "It is hereby consented, on the part of the co-defendant Main, that service of a copy of the answer of the defendants Thomas Mulry and Thomas M. Mulry on this date, or before trial, be deemed sufficient under the Code of Civil Procedure, and a failure to file *lis pendens* not to vitiate said co-defendant's right to a foreclosure, under the acts for enforcement of mechanics' liens, in case of his success in the case at bar on the merits and on the law, said defendants to abide the event of success or failure in this action with respect to their said claim, and the action of Leslie v. Main is hereby discontinued on this basis."

There was a trial, in which the defendants Mulry were successful, but the judgment was afterwards reversed. The subsequent proceedings are very vaguely described in the papers below, but in substance, the result was, that on the trial between the defendants, the learned judge held that the defendants Mulry were not entitled to proceed against defendant Main, because the plaintiff could not maintain the proceedings, either from a want of merits or because he had discontinued the action. Before judgment to this effect was entered, the defendants Mulry made the motion to set aside the stipulation. In the affidavit for the motion, it was said that those defendants proposed to enter an order of discontinuance.

The stipulation had the force of a contract, and could not be set aside except upon a clearly disclosed ground that would call for the annulling of any contract. The only ground that is given in the notice of motion, or referred to in the moving affidavit, is "that there has been no determination of success or failure as to said claim in their action, either upon the merits or the law." It is said in the affidavit that the "defendants have neither succeeded or failed in this action." If the ground be correctly stated, it is clear that the stipulation protects all the rights of the Mulrys. The fact that it does not injure them, is no ground for setting it aside. The affidavit does not allege that the defendants were surprised, or

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acted hastily or inadvisedly, nor that the defendant Main did or omitted to do anything which misled them to making the stipulation. In short, it states no equitable ground for setting aside a contract. On their position, they are as free to bring an action as they were before this proceeding was begun. Yet it would appear that they have no interest in the consequences of the stipulation. So far as facts are stated, it would appear that they are not the owners of the personal claim against defendant Main, for defendant Main shows by affidavit that the action in the marine court was brought by the assignees of the Mulrys. This is not denied, although they say the action was brought on their behalf, and that they mean to bring an action. They do not say that Leslie has re-assigned to them.

There being no ground for setting the stipulation aside, I am of opinion that each party should have been left to litigate their claims under it in any court, where it should be introduced by either party.

Order reversed with \$10 costs, and motion denied without costs.

FREEDMAN and TRUAX, JJ., concurred.

GEORGE KINNER, RESPONDENT, v. THE DELAWARE
& HUDSON CANAL Co., APPELLANT.

Evidence—contradicting witness—statements as to facts and circumstances inconsistent with direct testimony.

Where a witness, on his cross-examination, denies having made a statement as to a fact or circumstance, which is or may be argued to the jury to be within his knowledge, and which is inconsistent with matters material to the issue to which he has testified on the direct examination, the time when, place where and person to whom such statement was made being seasonably called to the attention of the witness, it may be proved, in contradiction as affecting his credibility, that he did make the statement.

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Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided June 1, 1885.

Appeal by defendant from judgment entered upon the verdict of a jury and from order denying motion for new trial made upon the minutes.

The plaintiff was the servant of another corporation than the defendant. In the course of his service he was working upon a certain railroad track, awaiting the coming of a car for the purpose of coupling to another by which he stood. It was alleged that the defendant's servants were negligent in moving the car coming towards plaintiff, and that it moved so fast, that while plaintiff was in the act of coupling, his hand was hurt.

Matthews & Rapallo, attorneys, *Edward S. Rapallo* and *Howard Townsend*, of counsel for appellant, on the questions considered in the opinion, cited:—*Thallheimer v. Brinckerhoff* (4 *Wend.* 394); *Luby v. Hudson R. R. Co.* (17 *N. Y.* 131); *Anderson v. Rome, Watertown & Ogdensburg R. R. Co.* (54 *N. Y.* 334); *Chapman v. Erie Railway Co.* (55 *N. Y.* 584); *Dean v. Aetna Life Ins. Co.* (62 *N. Y.* 642); *Johnston v. Thompson* (23 *Hun.* 90); *Combs v. Winchester* (39 *N. H.* 1); *Howard v. City Fire Ins. Co.* (4 *Den.* 502); *Great Western Turnpike Co. v. Loomis* (32 *N. Y.* 127); *Stokes v. People* (53 *N. Y.* 164); *Eames v. Whitaker* (123 *Mass.* 342); *Horner v. Everett* (91 *N. Y.* 641); *Carpenter v. Ward* (30 *N. Y.* 243).

C. D. Rust, attorney, and *Chauncey S. Truax*, of counsel for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—The defendants called as a witness a workman named Kelly, employed by them. On his direct examination he said he was shoving over cars that were to go down the track where the plaintiff was, when he was hurt. One car was stiff; the grease was hard, and they could not get it to run. The witness and another man had to get pinch bars and pinch

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the car down on the track referred to. Then it went down quite easily, and no faster than if a man stood at the brake. It was not necessary for a man to be at the brake, as the car was going so easily. He went down the track along side of the car and at the end of it, ready to step on it. The car was going at the usual rate of speed, that enabled a coupler to safely couple the car to the one ahead of it.

By other testimony it appeared that the plaintiff was on the track at the end of another car, for the purpose of coupling to it the moving car referred to by the witness Kelly.

The witness further said in substance, that as he was moving the car he referred to, he did not know that the plaintiff was on the track ready to couple. When he got within about forty feet of the cars ahead of the one he was moving, he hallooed to know where Kinner, the plaintiff was, to see if he was ready to couple that car. He got no reply; then he let the car go with the others. He turned back to get another car, when Kinner came down along the cars with his hand hurt. He said that the car he was going down with struck the other car it ran into, no harder than it would if a man had been at the brake regulating its speed.

On cross-examination by plaintiff, Kelly was asked if he had not said certain things, and he in effect denied that he had said them. The declarations, as supposed by the questions, were such as they assumed to have been made to the plaintiff immediately after the accident. This does not affect the principle on which this appeal on this point will be decided. In rebuttal, the plaintiff took the stand, and was asked several questions tending to show that Kelly had said the things which he had denied. The defendants took exceptions to the admissions of these questions. The ground of the objection is that the questions to Kelly related to matters that had not been brought out upon Kelly's direct examination, and referred to matters which were not evidence against the defend-

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ant, as the declarations of Kelly would not be testimony against them.

It seems to me that the assumption that the declarations pointed at by the questions did not refer to Kelly's direct examination, is not sustained by that examination. The rule that the declarations of a witness as to matters as to which he has testified, they being material to the issues, can be shown to affect his credibility after he has denied that he has made them, is not confined to the immediate things he testified to, but extends to circumstances within his knowledge, or which it may be argued to the jury are within his knowledge, inconsistent with the things he has testified to, or which would call for a modification of his testimony (*Sloan v. The New York Central R. R. Co.*, 45 *N. Y.* 126).

Some of the questions asked for the purpose of contradicting Kelly, referred to whether he had said that he saw the plaintiff go on to the track to make the coupling, but thought he had made it. This related to his direct examination, for the inference from that would be, naturally, that he had not seen the plaintiff. Other questions referred to whether Kelly had said, what he had denied saying, that there was no brakeman on the car because it was a cold morning, and the car was so stiff that he thought it would not run fast enough to require a brakeman. This referred to that part of his direct examination as to the actual cause of there being no brakeman on the car, which was relevant to the issue of defendant's negligence. Another question referred to whether Kelly had admitted that if he thought the plaintiff was going to get hurt, he could have run down close enough to have shouted to him to look out for himself. This referred by implication to facts that the jury might have considered in finding whether their existence was consistent with the precaution that Kelly swore he took by shouting out, under the circumstances that Kelly testified to.

I therefore think that the exceptions should not be sustained.

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After examining the testimony, I find in it facts that were properly submitted to the jury on the questions of negligence and contributory negligence.

The judgment and order appealed from should be affirmed, with costs.

FREEDMAN, J., concurred.

ROBERT W. FORBES, RESPONDENT, v. BERNARD
SPAULDING, APPELLANT.

Proceedings supplementary to execution—effect of return of proceedings to sell real estate under execution.

The sheriff, ninety days after an execution was issued to him, made the following return : "In pursuance of the demand of plaintiff's attorney, I make the following return to the within execution: I have collected nothing under, and have not found any personal property out of which the said execution, or any part of the same can be made, but I have thereunder levied upon the real estate mentioned in the annexed notice of sale, and have advertised the same for sale as in said notice provided. I have found no other property out of which to satisfy the same."

Held, that the execution was returned unsatisfied within the meaning of section 2435 Code, and that plaintiff was entitled thereunder to an order for defendant's examination in supplementary proceedings.

The effect of such a return is not modified by the statement of the sheriff, that it was made at request of plaintiff's attorney.

The proceeding to give notice of sale of real estate in execution of the statutory power for sale of real estate under a judgment, is not a satisfaction, because the real property remains in the debtor and in his possession.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided June 1, 1885.

Appeal by defendant from a order denying his motion to vacate an order for his examination in proceedings supplementary to execution.

The ground of the motion to vacate was that the execution had not been returned unsatisfied. The execu-

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tion was delivered to the sheriff on October 21, 1884, and returned by him February 5, 1885. The return was in the following words: "In pursuance of the demand of plaintiff's attorneys, I make the following return to the within execution: I have collected nothing under, and have not found any personal property out of which the said execution or any part of the same can be made, but I have thereunder levied upon the real estate mentioned in the annexed notice of sale, and have advertised the same for sale as in said notice provided. I have found no other property out of which to satisfy the same." To this was attached a copy of the notice of sale.

Alex. Thain, for appellant.

John H. Kitchen, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—The sole question is whether the execution was returned wholly or partly unsatisfied, within the meaning of section 2435 of the Code of Civil Procedure. If it were, the right of the plaintiff to the order of examination is clear. The general rules that relate to the right of a creditor to bring an action to apply equitable assets to the satisfaction of a judgment, in lieu of which, to a certain extent, supplementary proceedings were allowed, may be adverted to for the purpose of construing the statute, when construction is permitted, but not where the statute is unambiguous.

The effect of the return is not modified by its statement that the return was made at request of plaintiff's attorney. It was the duty of the sheriff to have made the return at a much earlier day.

It appears on the face of the return that the execution was unsatisfied, unless the statement that there was a levy upon real estate, and notice of sale under it, intimates that there was a satisfaction. Strictly, the levy of an execution upon real estate is now unknown to the law (*Wood v. Colvin*, 5 *Hill*, 228; *Colt v. Phoenix Fire Ins. Co.*, 54 *N. Y.* 595.) The performance of the mandate of

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the process is an execution of a power to sell, under the statute (*Wood v. Colvin, supra*). But the proceeding to give notice of sale in execution of that power, is not a satisfaction, because the real property remains in the debtor and in his possession. Therefore it is held that such a proceeding is not satisfaction (*Shepard v. Rowe*, 14 *Wend.* 260 ; *Taylor v. Ranney*, 4 *Hill*, 619).

In a creditor's action the fact that the debtor had property which might have been taken by legal process, was not a defense in the action. It was enough if the complainant had in good faith used the only power he had over the debtor's property, by issuing the legal process and awaiting its return.

In the present case, the appellant is not aided even by a presumption that the sale would result in the plaintiff's receiving any money under the judgment.

Of course, if the judge below had been satisfied that the same matter had been previously determined between the parties in favor of the defendant, he would have followed the first decision. It was not clearly shown that the same matter had been previously determined.

Order affirmed, with \$10 costs and disbursements to be taxed.

FREEDMAN, J., concurred.

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JULIUS CATLIN, JR., ET AL., APPELLANTS, v. GEORGE
F. VIETOR, ET AL., RESPONDENTS.

False representations—when sufficient as basis of action—reliance on essential to action founded on.

Defendants' broker offered for sale to plaintiffs several notes, amounting to about \$7,000, owned by defendants, made by P. L. Freneau & Co., customers of theirs, and the broker stated as a reason for defendants' desire to sell, that they had a large amount of orders waiting for delivery to the makers of the notes, but they were unwilling to deliver until they parted with the paper. Plaintiffs, not being satisfied with this, sent a clerk to defendants to obtain information. The clerk, without disclosing that he desired the information in regard to the plaintiffs having been offered notes belonging to the defendants, asked various questions, the answers to which were, in substance, that defendants had no information concerning P. L. Freneau & Co., other than what could be got from mercantile agencies; that they had no statement from them, but they sold them freely, and had several thousand dollars ready for delivery to them. This conversation was repeated to plaintiffs, and they bought the notes. One of the plaintiffs testified that he told the broker the next day that he did not like the statement of the makers of the notes, but thought they would pull through that season, as the defendants were going to deliver the goods, and the delivery would guarantee the payment of the notes. He also testified that the reason that actuated him was the fact that the defendants were going on to deliver their new goods through the season beginning with this particular purchase, and if they delivered this bill of \$8,000 or \$10,000 they would probably deliver another one.

Held, on appeal from a dismissal of the complaint, that as it was not proved either that defendants had not sold goods freely, considering the vague meaning of that term, or that they had not on hand ready for delivery a large amount, or several thousand dollars' worth of goods, and as they were not apprised of the expediency or duty of being exact, and as the statements as to those matters being the only ones which formed the basis of the reasons *on which alone plaintiffs relied* in purchasing the notes, as testified to by one of them, an action for false representations would not lie.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided June 1, 1885.

Appellants' points.

Appeal by plaintiffs from judgment for defendants entered upon a direction at trial term before a jury, that the complaint be dismissed.

The action was for damages from fraudulent concealment and false representations, alleged to have been made in respect of the credit and means of Freneau & Co., the makers of certain promissory notes which the plaintiffs bought of the defendants.

The facts appear in the opinion.

Martin & Smith, attorneys, *Aaron Pennington Whitehead* and *M. W. Divine*, of counsel for appellants, argued : —I. Fraud renders all contracts voidable *ab initio*, both at law and in equity. No man is bound by a bargain into which he has been deceived by a fraud, and a buyer may, if he has paid the price, recover it back on offering to return the thing purchased (*Benjamin Sales*, § 636 ; *Bank of Georgia v. Higginbottom*, 9 *Pet.* 48 ; *Baker v. Lever*, 67 *N. Y.* 304 ; *Pence v. Langdon*, 99 *U. S.* 578 ; *Kimball v. Cunningham*, 4 *Mass.* 502 ; *Coolidge v. Brigham*, 1 *Met.* 547 ; *Perkins v. Bailey*, 99 *Mass.* 61 ; *Waters' Patent Heater Co. v. Smith*, 120 *Mass.* 444).

II. Plaintiffs were induced to buy the worthless notes of P. L. Freneau & Co. by false and fraudulent representations made by the defendants. The plaintiffs made out a clear *prima facie* case of fraud, and the court ought to have allowed the jury to pass upon the question. The representation that defendants were selling P. L. Freneau & Co. freely was clearly false. Again, it was very material to the credit of P. L. Freneau & Co., and to their ability to pay the notes, which had a very short time to run, in all very little over six weeks, that a house was about to deliver them a large amount of goods and was selling them freely. The effect of the delivery of a large amount of goods would be to strengthen their standing and put them in funds for the proceeds of these goods and to enable them to go on. Any device, and any representation, whereby the seller causes the purchaser to labor

 Respondents' points.

under a deception on a point which the purchaser thinks material, is a fraud and entitles the purchaser to the return of his money (*Hill v. Gray*, 1 *Stark*. 434; *Duke of Norfolk v. Worthy*, 1 *Camp*. 337; *Bexwell v. Christie*, 1 *Cow*. 295; *Tapp v. Lee*, 3 *B. & P.* 367).

III. The fraud need not be the sole inducement or even the predominant motive; it is enough that the representations had material influence upon the plaintiffs, although combined with other motives (*Morgan v. Skiddy*, 62 *N. Y.* 319; *Hubbard v. Briggs*, 31 *Ib.* 518; *Safford v. Grout*, 120 *Mass.* 20; *Hersey v. Benedict*, 15 *Hun.* 282; *People v. Haynes*, 11 *Wend.* 557; *People v. Herrick*, 13 *Ib.* 87; *Clarke v. Dickson*, 6 *C. B. [N. S.]* 453).

IV. On proof that representations are material, the burden is upon the party making them to show that they were not relied on by the other party (*Kerr Fraud & Mistake*, 75; 2 *Benjamin Sales*, 556; *Smith v. Kay*, 7 *H. L. Cas.* 750; *Nicols' Case*, 3 *De G. & J.* 404; *Holbrook v. Burt*, 22 *Pick.* 546).

V. In any view of this case, it should have been passed upon by the jury.

Seward, Da Costa & Guthrie, attorneys, *Charles M. Da Costa* and *William D. Guthrie*, of counsel for respondents, argued:—I. There is not the slightest evidence in the case of any intent to deceive on the part of the defendants or any one representing them. The courts lean more strongly now than ever before against inferring such intent without proper evidence (*Morris v. Talcott*, 96 *N. Y.* 100; *Leffler v. Field*, 52 *Ib.* 621; *Salisbury v. Howe*, 87 *Ib.* 128; *Frisbee v. Fitzsimmons*, 3 *Hun.* 674).

II. The evidence is equally wanting to prove that what defendants or their representatives said was "either false or known to be false," within the language of the authorities. Yet neither of these elements can be wanting to constitute a case of fraudulent representation (*Oberlander v. Spies*, 45 *N. Y.* 175).

III. The elements of influence by and reliance on the

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alleged representations are essential (*Leffler v. Field*, 52 N. Y. 621; *Taylor v. Guest*, 58 *Ib.* 266; *Dudley v. Scranton*, 57 *Ib.* 428; *Smith v. Chadwick*, L. R. 20 Ch. D. 27; *Macullar v. McKinley*, 49 *Super. Ct.* 5). These were totally absent.

IV. The utmost, however, that the plaintiffs can by any possibility claim is, that the jury would, on the evidence, have been warranted in finding, that when Riley and Shaw, on January 30 and 31, stated that the defendants had goods ready to deliver to Freneau & Co., they (the defendants) then intended not to deliver them on February 1, or thereafter. In other words, that the defendants then, viz.: on January 30 and 31, promised to do in the future, viz.: on February 1 and thereafter, what they never intended to do. But for a breach of such a promise, no action, grounded in fraud, will lie. In other words, no such action can be based on what may be termed a promissory fraud. It has its sole foundation in the falsity of the representation of an existing fact, made for the purpose of inducement (*Gray v. Palmer*, 2 *Robt.* 500; *aff'd*, 41 N. Y. 620; see 2 *Barb.* 500; *Ex parte Fisher v. New York Common Pleas*, 18 *Wend.* 608; *Farrington v. Bullard*, 40 *Barb.* 512; *Lexow v. Julian*, 21 *Hun.* 577; *affirmed*, 86 N. Y. 638; *Lynch v. Dowling*, *City Court Rep.* 163; *Gallager v. Brunel*, 6 *Cow.* 346; *Sawyer v. Prickett*, 19 *Wall.* 146).

Precisely the same distinction exists in the law of estoppel *in pais*. To constitute an estoppel *in pais* there must be a representation of an existing fact. An equitable estoppel can never be grounded on a mere promise (*White v. Ashton*, 51 N. Y. 280; *Musgrave v. Sherwood*, 54 *How. Pr.* 338).

Under no aspect of the case is the view tenable that defendants withheld information which they were bound in duty to give (*People's Bk. v. Bogart*, 81 N. Y. 101).

BY THE COURT.—SEDGWICK, Ch. J.—The plaintiffs' alleged cause of action is that they were induced, by fraudu-

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lent concealments and by false and fraudulent representations, on the part of defendants, to buy from them certain promissory notes to the amount of about \$7,000. The alleged concealments and representations concerned the pecuniary responsibility of the makers of the notes, and also facts which it is argued for plaintiffs, the defendants affirmed existed, and the existence of which they represented to be their reason for offering the notes for sale.

It is a necessary part of such a cause of action to show that the plaintiffs, relied upon the statements, or were induced by them to part with the money. Perhaps this can be proved circumstantially or by presumption from the nature of the transaction. In the present case, one of the plaintiffs who acted for both, specifically stated upon what part of the alleged representations he relied. His testimony was so explicit and of such a form that the jury would not have been at liberty to find that he relied upon the other parts of the representation or upon the existence of anything that it was alleged the defendants fraudulently concealed.

The plaintiffs had procured from the makers of the notes a statement as to their property and liabilities. The broker for defendants who had presented to plaintiffs the notes for sale, had said to plaintiffs that the reason the defendants wanted to sell the notes was, "that they had a large amount of merchandise on orders waiting delivery to the makers of the notes, and that they were unwilling to deliver the goods until they parted with the paper." The plaintiff, who testified on the trial, was not satisfied with this, but sent his clerk to the defendants' store. This clerk saw a clerk of defendants, and had a conversation with him, in presence, as plaintiffs' clerk testified, of one of the defendants. Plaintiffs' clerk had been told to go to defendants' store and ask one of them about the paper in question. The conversation was as follows: Plaintiffs' clerk said, "Good morning, Mr. Riley. I have called to see if you can give Mr. Catlin any information about Freneau & Co." After a slight pause, Mr. Riley replied,

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"We have no information about P. L. Freneau & Co. that M. Catlin cannot get from the mercantile agencies." After another slight pause, plaintiffs' clerk said, "I presume Mr. Catlin wants to know in regard to paper, as I saw Mr. Shaw (who was defendants' broker) in there just before I came away—whether for himself or the bank, I do not know. You have no statement from them?" After another slight pause, Mr. Riley replied, "No, we sell them freely, and have several thousand dollars ready to deliver them now." After another slight pause, the clerk of plaintiffs said, "Good morning. I am sorry to trouble you. I thought you could have told me more." This conversation was repeated to the plaintiffs. The next day the plaintiff who testified, saw the broker of the defendants, and said he did not like the statement of the makers of the notes, but that he thought they would pull through that season, as defendants were going to deliver the goods, and the delivery would guarantee the payment of the notes. He testified that that reason operated upon his mind in taking the notes; that is, that they had the goods ready and would deliver the goods. Finally, as the exact description of the operation of his mind, he testified, "The reason that actuated me was the fact that the defendants were going on to deliver these new goods through the season, beginning with this particular purchase, and if they delivered this bill of \$8,000 or \$10,000, they would probably deliver another one." The substance of this consisted of a conjecture of what the defendants would do, in the future, in their dealings with the makers of the notes. The defendants or their broker had not referred, in any way, to future dealings. The only fact that they or their broker had stated, which might be thought to be the starting point of this conjecture, was that they had sold to Freneau & Co. freely, and had on hand, for delivery to them, a large amount of goods, or several thousand dollars' worth of goods. It was not proved that the defendants had not sold goods to Freneau & Co. freely, in consideration of the vague meaning of such a term. Nor

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was it shown to be untrue that the defendants had on hand, ready for delivery, a large amount of goods, or several thousand dollars' worth of goods, unless it could be shown that the defendants intended that the words used on this subject should be understood in their strict sense, that is, ready for delivery forthwith, the defendants having definitely determined to deliver forthwith. But the plaintiffs knew there was some question on this point, for they had been told that the goods were not to be delivered, unless the notes were sold. They did not inform the defendants that they desired information, with a regard to the plaintiffs having been offered notes that belonged to the defendants. The plaintiffs' clerk said merely that he presumed the plaintiffs' inquiry related to some paper of Freneau & Co., generally, because he had seen the broker in plaintiffs' store, and the answers he received must be construed as given by a person not apprised of the expediency or duty of being exact. There was no statement, at any time, that the goods in question were of the value of \$7,000 and more, as the plaintiffs assumed, and in fact there was on hand, ready for delivery, so far as the bargaining between the parties went, goods to the amount of \$1,800.

I think it is apparent that the clerk of defendants who talked with plaintiffs' clerk, declined, substantially, to make statements upon which plaintiffs should act, for the latter were informed that the defendants knew nothing which the plaintiffs could not learn from the mercantile agencies. They, so far as the testimony shows, omitted to obtain information from the agencies, and should not now hold the defendants for fraud for a vague and casual remark made subject to the direction to get information elsewhere.

Judgment affirmed, with costs.

FREEDMAN, J., concurred.

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HERMAN WRONKOW v. HENRY CLEWS, ET AL.

Stock transaction—"stop order," usual meaning—meaning in broker's letters.

The phrase "stop order" means that the broker has received and is bound by a direction of his principals to sell at a price described, when that price is reached in the market. The price may be described by referring to contingencies and conditions.

But the phrase in a letter to his principal by a broker with discretion to sell stock bought by said broker on account of such principal, on a margin, stating the price at which the stock was then selling, calling for more margin to be put up on receipt of the letter, and adding, "In the meantime we enter stop order," means that the broker would stop entirely in everything and fix the transaction in *statu quo* until the principal should be heard from. If it could be regarded as being used in the ordinary sense, it could only mean that the broker imposed on himself an obligation to sell at a price lower than that mentioned in his letter. In either event (the stock having subsequent to the letter been sold by the principal's order, and bringing less than the rate mentioned in the letter), the principal cannot charge the stock against the broker at the rate mentioned in the letter.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 1, 1885.

Plaintiff's exception to a dismissal of the complaint at trial term before a jury, ordered to be heard in first instance at general term.

The defendants were the stockbrokers of plaintiff, who had deposited with defendants certain securities in a transaction in which defendants had bought for plaintiff shares of railway stock. The plaintiff tendered to them an amount as due by him upon the sale, and demanded the securities deposited by him. The defendants refused to deliver on the ground that the plaintiff owed more than he had tendered.

Melville H. Regensburger, attorney, and of counsel for plaintiff.

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Abbott Brothers, attorneys, and *Albert A. Abbott*, of counsel for defendants.

BY THE COURT.—SEDGWICK, Ch. J.—The defendants bought on account of plaintiff, six hundred shares of the stock of the Northwestern Railway Company, agreeing to hold it for him so long as he should give them a sufficient amount of security. He was about to go to Europe. The defendants held \$15,000 as security. The plaintiff furnished as security, in addition, thirty shares of Central Pacific Railway stock, and thirty shares of Pennsylvania Railroad stock. It was agreed that in his absence, the defendants should act for him in their discretion. He went to Hamburg. On May 12, the defendants sent to him by the post-office, "We are compelled to call upon you for additional margin on your stock at present prices, which are as follows: No. West. 105½, Cent. Pac. 41¾, Penn. Cent. 56. You will see that you only have about 3 per cent. margin in our hands; please, therefor, send us a cable on receipt of this letter, for \$5,000. In the meantime we enter stop order."

The plaintiff received this letter at about 8 o'clock in the morning of May 24. He immediately telegraphed to defendants, "Sell all North Western. Keep Central Pacific, Pennsylvania. Settle on my return." At about 2 o'clock in the afternoon of the same day, he received from the defendants the following telegraphic message: "Cable \$10,000. North West. 97, answer," and at about 4 o'clock "Sold all 95."

The plaintiff, on his return to New York, assuming that the defendants were bound to sell the North Western stock at 105½, as the price at which it stood on May 12, according to the letter of that date, tendered to the defendants the amount that would be due to them upon such a sale, and demanded delivery to him of the stock that had been kept as security. This was refused on the ground that the plaintiff owed the defendants \$6,000.

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The action is for conversion in not delivering the stock on the demand that has been referred to.

It may be assumed that the defendants were entitled to retain the security, if the plaintiff, in demanding it, tendered less than was due by him to defendants. He tendered an amount that would have been due if the defendants had sold at 105½. The plaintiff claims that they were bound to sell at that price, because they had so undertaken by the letter of May 12, in entering the stop order, as the letter called it.

It is agreed that usually a stop order signifies that the broker has received and is bound to obey a direction of his principal to sell at a price described, when that price is reached in the market. A stop order may, however, describe the price by referring to contingencies and conditions. To be a stop order it is not essential that a definite figure as the price be named. In the present case, no stop order was in fact made. It did not come from the principal, and the brokers had been empowered to act in their discretion. If used in the ordinary sense in the letter, it means that the defendants have resolved or imposed upon themselves the obligation to sell at a price. This, however, could not mean that the price was to be 105½, for that price had been reached, and had that price been intended, there would have been an immediate sale. It must have referred to a price lower than 105½, and if it did, it is clear that the plaintiffs did not tender an amount that would be due at any price less than 105½.

In reality, however, the words were not used in their ordinary sense. Take all the letter and the circumstances, the controlling fact was that the transaction was not to be closed until the plaintiff had an opportunity to answer by cable the letter that was sent by mail, and the words "in the meantime, we enter stop order," were intended to describe what the defendants would do to keep the transaction open, that is, to stop entirely in everything, and to fix it in *statu quo*, until the plaintiff should answer. This was done by defendants, and the plaintiff thereupon

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gave a direction by cable, which permitted the defendants to proceed, and as they sold as requested by plaintiff, he is bound by the result.

The plaintiff's exceptions are overruled, and judgment directed to be entered that complaint be dismissed with costs.

FREEDMAN and TRUAX, JJ., concurred.

JOHN M. FISHER, APPELLANT, v. THE CHARTER
OAK LIFE INSURANCE Co., RESPONDENT.

Demurrer — want of jurisdiction over foreign corporation—facts stated not authorizing relief asked.—Agreement to apportion and pay—Cause of action on.—Foreign corporation—no interference with internal administration.

The jurisdiction of the superior court is to be presumed. A demurrer is not well taken unless the facts showing want of jurisdiction appear on the face of the complaint. Therefore, a complaint in an action against a foreign corporation, upon contract, which does not show when the contract was made, executed or delivered, nor when nor how the summons was served, is not demurrable for want of jurisdiction, either of the person or the subject matter.

A demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action is well taken, if the facts stated do not authorize the judgment prayed for, although they may authorize some other relief.

In case of an agreement to apportion and pay the amount apportioned, apportionment is necessary before an action will lie for a money judgment. Therefore, a demurrer to a complaint in an action brought on such an agreement before apportionment, demanding a money judgment, is well taken. But upon proper proof an action will lie to compel the making of an apportionment.

The courts of this state will not interfere with the internal administration of the affairs of a foreign corporation, its officers, books and assets not being within their jurisdiction. Therefore, there is no cause of action in this state against such corporation to compel it to perform its agreement to make apportionment of moneys to be received by it.

Query, whether a complaint alleging facts claimed to constitute such a

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cause of action against such foreign corporation, and praying for the equitable relief that it make apportionment, is demurrable as showing want of jurisdiction of the subject matter ?

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 1, 1885.

Appeal from judgment in favor of defendant, upon demurrer to complaint.

Defendant demurred to the complaint on the following grounds : First.—That the court had not jurisdiction of the person of the defendant ; Second.—That the court had not jurisdiction of the subject of the action ; Third.—That the amended complaint did not state facts sufficient to constitute a cause of action.

The demurrer was argued before, and decided by INGRAHAM, J., who delivered the following opinion :—

“As to the first and second grounds of the demurrer, it is sufficient to say that the defects do not appear upon the face of the complaint.

“By subdivision 7 of section 263 of the Code, a superior city court has jurisdiction where an action is brought by a resident of that city against a foreign corporation, to recover damages for breach of a contract, or a sum payable by the terms of a contract, when the contract was made, executed or delivered within this state, or where the summons is served by the delivery of a copy thereof within that city to an officer of the corporation, as prescribed by law. By section 266, it is provided that the jurisdiction of a superior city court, in an action or special proceeding, must always be presumed, and when the defendant appears in the action, the want of jurisdiction is waived by appearance, unless it is pleaded in defense.

“This is an action on contract ; it does not appear on the face of the complaint that the contract was not made, executed or delivered within this state, nor that the summons was not served on an officer of the defendant within the city, as prescribed by law, and it therefore

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does not appear on the face of the complaint that the court has not jurisdiction of the person of the defendant, or of the subject of the action.

"As to the third ground of demurrer. The action must, I think, be deemed an action at law for the recovery of a specific sum of money. The only relief demanded in the complaint is a money judgment against the defendant. No other or different relief is asked for, and if plaintiff is not entitled, on the facts alleged in the complaint, to judgment for a specific sum of money against the defendant, the demurrer must be sustained (*Edson v. Girvan*, 29 *Hun*, 422).

"The agreement on which the action is brought provides, that 'whereas, a portion of the assets of the company (defendant) are of uncertain value, and cannot be made available as a part of the reserve of the company, and it has become necessary to reduce the liabilities of said company, the plaintiff agrees to reduce the amount of the policy payable to him, two-fifths, viz: from \$2,000 to \$1,200, and the defendant agrees that when the said company shall realize from said uncertain assets any divisible surplus, which may properly be divided among the holders of policies so reduced, said company will from time to time apportion to the said policy . . . its fair and equitable proportion of said divisible surplus, by adding to said policy or otherwise, which dividend shall continue upon such reduced policies after they become due and are settled, as well as upon those which remain in force.'

"This is an express obligation of the defendant, on the realization from the 'uncertain assets of a divisible surplus, which may properly be divided among the holders of policies so reduced.' When a divisible surplus shall have been realized, the company is bound to apportion to said policy its fair and equitable proportion; no discretion is vested in the company. It is not provided that the company may apportion, but it agrees it will apportion. That agreement is founded on a valid consideration, and is one which the court can and should enforce.

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Cases cited by defendant, that when a board of commissioners are vested by statute with a discretion to apportion, such discretion will not be controlled by the court, do not apply to a case where one of the parties to a contract agrees to apportion. In one case, the statute expressly vests such discretion in third parties, in the other the party to the contract agrees to do a particular act.

“The complaint alleges that since the execution and delivery of the said agreement, defendant has realized from the uncertain assets referred to in said agreement, a divisible surplus which under the terms of the said agreement, may properly be divided among the holders of reduced policies, to such an amount that the defendant may and can now properly apportion to said policy issued to this plaintiff, and reduced by the terms of the said agreement, the full amount of the difference between the amount paid to this plaintiff thereon as aforesaid, and the original amount of said policy, to wit, the sum of \$800, and may and can properly and legally pay that amount to this plaintiff as provided by said agreement. Are the allegations sufficient to give the plaintiff a right to a money judgment for \$800, or any other sum?

“It will be noticed that the agreement is not to pay the policy-holder any sum he is entitled on any divisible surplus being realized from the uncertain assets, but to have apportioned to said policy its fair and equitable proportion of such divisible surplus. He is entitled to his fair and equitable proportion, and before that can be ascertained, it must appear what its fair and equitable proportion would be, and the defendant must then be required to apportion such a sum to the plaintiff. The word apportion means to ‘divide and assign in just proportion,’ ‘to distribute among two or more a just part or share to each,’ and this is what the defendant has agreed to do, and such proportion must be ascertained before a judgment can be given against the defendant for a sum of money.

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“The case of *Boardman v. Lake Shore & Michigan Southern R’y Co.* (84 N. Y. 157), is instructive on this point. That was an action brought to compel the defendant, a foreign corporation, to pay dividends on certain preferred stock. By the certificate of stock it was provided that said stock is entitled to dividends at the rate of ten per cent. per annum, ‘payable semi-annually, and the payment of dividends as aforesaid, is hereby guaranteed.’ In affirming a judgment in favor of the plaintiff requiring the defendant to pay dividends to him, and restraining defendant from paying dividends on its common stock until the claim of plaintiff was paid and satisfied, the court says, at page 180 : ‘While, as a general rule, courts of equity will not exercise visitorial powers over corporations, and its officers are the sole judges as to the propriety of declaring dividends, and in this respect the court will not interfere with the proper exercise of their discretion, yet when the right to the dividend is clear and fixed by the contract, and requires the directors to take action before it can be asserted by an action at law, and a restraint by injunction is essential to maintain the rights of the stockholder, the interposition of a court of equity is a proper exercise of its power, and should be upheld. . . . The judgment here requires a specific performance of the contract, and such relief could not be obtained by an action to recover the dividend.’

“The relief here would be for a specific performance of the agreement, viz.: to ascertain the divisible surplus and apportion it among the holders of reduced policies; but such relief is not asked for in this action, and as the defendant did not answer, but demurred, plaintiff is not entitled to such equitable relief (*Edson v. Girvan*, 29 Hun, 422).

“There is another objection to the complaint, which I think is well taken. The complaint does not state facts; the allegations are simply conclusions. ‘That a divisible surplus has been realized which may properly be divided among the holders of reduced policies to such

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an amount that said defendant may and can properly and legally apportion to said policy held by this plaintiff, the full amount of the difference between the amount paid and the full amount, are simply conclusions. The Code requires that the facts should be stated from which the conclusions are to be drawn.

"The demurrer must therefore be sustained, and judgment ordered for the defendant on the demurrer, with costs, with leave to plaintiff to amend within twenty days, on payment of costs."

From the order entered in conformity with this decision, the plaintiff appealed to the general term.

William Settle, attorney, and of counsel for appellant, argued :—I. When the contingency provided for in the agreement, to wit, the realization occurred, the right to the balance became fixed, and existed independent of any act of the corporation or its officers (*Boardman v. Lake Sho. & Mich. So. Ry. Co.*, 84 N. Y. 178). In that case the court held that the action was properly brought for specific performance, because the action was not brought to recover the dividends alone, but to compel the defendant to do certain other acts, without which there would be no power to pay the dividends, thus intimating that if it was an action for dividends alone, no accounting would be necessary. In the case at bar the action is brought to recover the fixed amount (dividends) remaining unpaid upon the policy. The agreement is that the company will apportion to the policy in question its fair and equitable proportion, etc.; not such an amount as they may think proper, but "its fair and equitable proportion." If the company is able to pay the whole of the balance unpaid on the policy, then that is its fair and equitable proportion, and the complaint alleges that it is able so to do, and the demurrer admits it.

II. If an accounting is necessary, the plaintiff should have been allowed it under the complaint. The complaint states sufficient to entitle plaintiff to an accounting; that

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being so, the complaint should not have been dismissed, even though no accounting was demanded therein (*Sternberger v. McGovern*, 56 N. Y. 12). In that case the court held that when the complaint sets up a claim for legal and equitable relief, the plaintiff has a right to have both tried. It is true that by section 1207 of the Code, where no answer is interposed, the judgment shall not be more favorable to the plaintiff than that demanded in the complaint—but would a judgment for an accounting be more favorable? the demand in the complaint is for a fixed sum of money, \$800—under no circumstance could plaintiff recover more than that amount under an accounting, and hence the judgment would not be more favorable, and section 1207 of the Code, and *Edson v. Girvan* (29 Hun, 422), cited by Judge INGRAHAM in his opinion at special term, have no application.

Alexander & Green, attorneys, and *Charles B. Alexander*, of counsel for respondent, argued :—I. Unless the plaintiff can, on the facts disclosed, show himself entitled to money damages in an action at law, the demurrer must be sustained. The prayer for relief taken in conjunction with the averments of the complaint, is conclusive upon the plaintiff that this is an action at law for damage in a case where a demurrer has been interposed (*Kelly v. Downing*, 42 N. Y. 71; *Alexander v. Katte*, 63 How. 262; *Taylor v. Charter Oak L. I. Co.*, 9 Daly, 489; *Edson v. Girvan*, 29 Hun, 424; *Murtha v. Curley*, 90 N. Y. 372; *Covert v. Henneberger*, 53 How. Pr. 1). Where an answer is interposed, the plaintiff can have any relief consistent with the case made by the complaint and embraced within the issue (*Murtha v. Curley*, 90 N. Y. 372). Of course, where an answer is not interposed, this would not be the case; and for the purposes of section 1207, a demurrer is not an answer (*Kelly v. Downing*, *supra*).

II. The averments of the complaint do not entitle plaintiff to a money judgment. 1. An apportionment must take place before anything becomes due to the

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plaintiff, and this has never been made. Apportion is a word of well-understood meaning both in literature and law. It is derived from the Latin words *ad* and *portio*. It is defined by Webster as meaning to divide and assign in just proportion. The word has had careful judicial definition and consideration (*Haight v. Day*, 1 *John. Ch.* 18; *Clarke v. Brooklyn Bank*, 1 *Edw. Ch.* 368; 1 *Story's Eq. Jur.* 475 a; *Walker v. Devereaux*, 4 *Paige*, 253; *Le Roy v. Corporation of N. Y.*, 4 *Johns. Ch.* 356). 2. The apportionment not having been made, the action will not lie to recover what might be the result of such apportionment, if such apportionment was had (*Del. & Hud. Canal Co. v. Pa. Coal Co.*, 50 *N. Y.* 250; *Scott v. Avery*, 5 *H. L. Cas.* 811; *United States v. Robeson*, 9 *Peters*, 319; *Perkins v. U. S. Electric Light Co.*, 15 *The Rep.* 680; *Milnes v. Gery*, 14 *Vesey*, 400; *Scott v. Corporation of Liverpool*, 3 *De Gex & J.* 334; *Hood v. Hartshorn*, 100 *Mass.* 117). 3. No action can be sustained, because by the contract and by the complaint, the suit is brought for a dividend, and no action at law will lie to obtain a dividend until it is declared by the body charged with the duty of declaring it (*Meeker v. Wright*, 76 *N. Y.* 272; *Davis v. Mayor*, 14 *Ib.* 506; *Chase v. Vanderbilt*, 37 *Super. Ct.* 334; *Webb v. Vanderbilt*, 39 *Super. Ct.* 9; *Prouty v. Michigan Southern R. R. Co.*, 4 *T. & C. [Sup. Ct.]* 241; *Williams v. Western Union Tel. Co.*, 93 *N. Y.* 192).

III. If this action is to be treated as a suit in equity, then there is no cause of action pleaded. Equity will only interfere where willful abuse of discretion is alleged. The most striking case on this point is *Karnes v. Rochester & Genesee Valley R. R.* (4 *Abb. N. S.* 107). The complaint alleged the existence of an enormous surplus applicable to the payment of a dividend, and prayed an accounting and division. Defendant demurred, and the court sustained the demurrer on the principle above stated. See *Verplanck v. Mercantile Ins. Co.* (1 *Edw.* 84); *Luling v. Atlantic Mut. Ins. Co.* (45 *Barb.* 510); *Ely v. Sprague* (1 *Clarke*, 351); *State of La. v. Bank of La.* (3 *La.* 771); *Pratt v.*

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Pratt (33 Conn. 446); Scott v. Eagle Fire Co. (7 Paige, 198); Williams v. Western Union Tel. Co. (*supra*); Goodwin v. Hardy (57 Me. 143); Minot v. Paine (99 Mass. 101); Granger v. Bassett (98 Mass. 462); Phelps v. Farmers' Bank (26 Conn. 269); Hyatt v. Allen (56 N. Y. 553); Jones v. Terre Haute & Richmond R. R. Co. (57 N. Y. 196); Brundage v. Brundage (1 Supm. Ct. [T. & C.] 82).

IV. This court has no jurisdiction of the person of the defendant. The defendant is a Connecticut corporation. The plaintiff does not appear to be a resident of New York (*Code*, § 263, *sub. 7*.)

V. The court has no jurisdiction of the subject of the action. The courts of this state will not exercise jurisdiction on their equity side to compel the declaration of a dividend. This rule applies to all courts, and not alone to the supreme court (*Chase v. Vanderbilt, supra*; *Whitehead v. Buffalo & Lake Huron Ry. Co.*, 18 How. 218; *Howell v. Chicago & N. W. R. R. Co.*, 51 Barb. 382; *Smith v. Mutual Life of N. Y.*, 14 Allen, 336; *Landers v. Staten Island R. R.*, 14 Abb. N. S. 346; *Thornton v. St. Paul & Chicago R. R.*, 45 How. Pr. 426; *Williston v. Mich. Southern Railroad*, 13 Allen, 400; *Merrick v. Van Santvoord*, 34 N. Y. 222; *Eaton v. Aspinwall*, 19 N. Y. 119; *Buffalo & Allegany R. R. Co. v. Cary*, 26 N. Y. 75; *Reiner v. Marquis of Salisbury*, L. R. 2 Ch. Div. 378; *Matthaei v. Galitzin*, L. R. 18 Eq. R. 340; *Doss v. Secretary of State*, L. R. 19 Eq. 534; *Ogdensburgh R. R. v. Vermont R. R.*, 16 Abb. Pr. N. S. 250). The objection to the jurisdiction is not waived by the appearance of defendant (*Wheelock v. Lee*, 74 N. Y. 498).

BY THE COURT.—SEDGWICK, Ch. J.—For the reasons given by the judge below, I agree with him that the issue upon the demurrer was whether the plaintiff was entitled, upon the averments of the complaint, to the judgment demanded by it. The demand was for a judgment against the defendant, in a specified amount. I also agree that under the terms of the contract, in advance of

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an apportionment to the policy, of its fair and equitable proportion of the divisible surplus referred to, the plaintiff would have no right to demand a money judgment. If the failure to apportion be decreed a breach of contract, there is no possible mode of assessing damages. For the amount of the apportionment can be fixed only through the exercise, in fact, of a discretion by the officers of the company, in view of present circumstances and future contingencies. A court or jury could not exercise that discretion, even if the agreement did not, as it does, contemplate that the officers should exercise it in trust for the whole body of the holders of policies.

The result is that the demurrer was properly sustained.

If nothing more be said, there may be an application to amend, by changing the demand for judgment in the complaint, to a demand for an accounting, as it was called, on the agreement, or perhaps for a judgment that the defendant proceed to apportion it.

The allegations in the complaint that would be relied upon as the ground of the new demand, show that for sufficient consideration, the defendant has contracted to apportion, &c. This contract has modified whatever would have been the implication as to the right of the company to refrain from making dividends, if the relations between it and the plaintiff were the same as if the plaintiff were a shareholder merely. The plaintiff would have a right to the enforcement of the contract, upon making proper proof.

x The performance of the contract by defendant would involve the doing of such things by its officers as would be done by them, if they were proceeding to ascertain if a dividend of profits should be declared in a case where profits could be divided among shareholders. The defendant is a foreign corporation. This court has no facilities or processes sufficient or fit to compel a foreign corporation to take the proceeding described. It cannot bring the officers or the books or the assets of the corporation

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within its jurisdiction. It must enforce such a judgment, if at all, by proceedings for contempt, and yet there are no persons here whose action can direct the proceedings of the company. Under such circumstances, it is said that a court of equity will refrain from proceeding to a judgment, and that the court of equity will not interfere with the internal administration of the affairs of a foreign corporation (*Cumberland Coal Co. v. Hoffman Coal Co.*, 30 *Barb.* at p. 171; *Howell v. Chicago & North Western Ry. Co.*, 50 *Barb.* at p. 383; *Chase v. Vanderbilt*, 37 *Super. Ct.* at p. 356, and cases cited).

The learned counsel for respondent takes the position now referred to, under that ground of the demurrer that states that the court has no jurisdiction of the subject of the action. If this be not formally correct, and it is unnecessary to pass upon this, it is true that there is no cause of action here in this state, as the law does not give any remedy here for the things complained of.

Judgment affirmed, with costs.

FREEDMAN and TRUAX, JJ., concurred.

SAMUEL T. WILBUR, RESPONDENT, v. THE GOLD & STOCK TELEGRAPH CO., APPELLANT.

Equity.—Specific performance.—Pleading.—Supplemental answer.

In an action for specific performance of a contract,—*e. g.*, to furnish certain telegraphic information,—where it appears that the defendant is unable to specifically perform, the usual practice is to withhold the relief prayed for.

Where the alleged inability arises after the beginning of the action, the defendant should be allowed to plead the facts tending to show such inability, by supplemental answer.

Accordingly, where by the contract sought to be enforced, the defendant agreed to furnish plaintiff with information concerning the daily transactions of a certain Board of Trade, and after this action was brought, said Board of Trade refused to allow reports to be taken by the agents

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of the Western Union Telegraph Co., from whom alone defendant was able to obtain such information, and said board thereafter furnished such information to the Western Union Telegraph Co., only for transmission to certain specified persons, viz., subscribers approved by the board aforesaid, of whom plaintiff was not one. *Held*, that defendant should be allowed to set up said facts by supplemental answer.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided June 1, 1885.

Appeal by defendant from order denying its motion for leave to serve a supplemental answer.

The complaint contained, among other averments, the following:

"I. That at all times herein mentioned, the plaintiff was, and still is, a dealer in grain, provisions and produce, having his office in the city of New York, and having a large number of customers dealing with him in his said business.

"II. That the defendant is a corporation, organized as plaintiff is informed and believes, under the laws of the state of New York, for the purpose of furnishing to such person or persons as may pay the regular price or sum asked by defendant therefor, the market quotations of grain, provisions and produce dealt in at the Produce Exchange, in the city of New York, and at the Board of Trade, in the city of Chicago, and elsewhere.

"III. That the said quotations and information are furnished and supplied to the persons so paying therefor by means of a recording instrument or machine, commonly called a 'ticker,' placed in the office or store of the person so paying, which machine or instrument is connected by telegraphic or electrical wires with the main circuit of the defendant's lines.

"IV. That in or about the month of April, 1883, the defendant placed in the office of the plaintiff, at 18 Broadway, New York city, two of said 'tickers,' so called, the plaintiff agreeing to pay therefor, at the end of each and every month, the regular charge or fee therefor for the

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use thereof, and for all the quotations and information regularly recorded thereon ; the said machines and instruments to be and remain with the plaintiff so long as he should well and truly pay therefor ; and the said plaintiff thereupon paid unto the defendant the sum of \$100 by way of deposit to cover any deficiency that might at any time exist in said payments. That thereafter the said 'tickers' remained in and upon said premises, but the defendant, without default of any kind on the part of the plaintiff, by its agents or servants, now threaten and are about to enter into and upon the premises of the plaintiff, and by force and violence to disconnect said machines and instruments, and remove them from the said place, and likewise to disconnect the wires connecting the said machines or instruments with the regular circuits of information of the defendant, and deprive him of all and all manner of quotation or information so agreed to be furnished him, in violation of its agreement and of its obligation and duty imposed by law, and to the ruin of his business and his irreparable damage and injury."

The complaint demanded as relief judgment that so long as plaintiff complied with the conditions of the contract on his part, the defendant be enjoined from removing said instruments, &c.

The defendants moved for leave to file a supplemental answer, which contained the following averments :

"First. The defendant alleges that at the time of the making of the contracts mentioned in the complaint, and in the original answer of this defendant herein, and thereafter until April 30, 1884, the Chicago Board of Trade permitted the agents of the Western Union Telegraph Company to attend its daily sessions and to collect and transmit reports of prices and of transactions on the said Board of Trade, and during said period, to wit, until the said 30th day of April, 1884, the said Western Union Telegraph Company furnished said reports to defendant, which was thus, and thus only, enabled to furnish the same to plaintiff by means of the reporting instruments

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mentioned in the complaint and answer herein as aforesaid.

"Second. Defendant further alleges that on or about May 1, 1884, the reporters and agents of the Western Union Telegraph Company were, and ever since have been, excluded by said Chicago Board of Trade from its sessions and from the floor of the Exchange, and since said last mentioned date the reports of prices and transactions on the floor of said Exchange, and all other information as to matters connected with the business of said Chicago Board of Trade, have been collected and compiled by the agents of said Board of Trade exclusively. That said reports so collected and compiled have since said 30th day of April, 1884, been delivered by said Chicago Board of Trade to said Western Union Telegraph Company for transmission to such persons, and to such persons only, as have been designated by said Chicago Board of Trade; and said Western Union Telegraph Company and this defendant have been expressly forbidden to deliver said reports to any persons not so designated. That no persons have been so designated as entitled to receive said reports except such as by special contract have become subscribers therefor to said Board of Trade upon a regular application duly approved by said Board of Trade, and made pursuant to the terms of a circular letter, a copy of which is hereto annexed, marked 'A.'"

There were other averments tending to show that the defendants were unable to comply specifically with their contract.

The judge denied the motion, on the ground that the right of the parties to the contract must be determined by the contract, and that the directions given by the Board of Trade cannot excuse the defendant from performing their agreement with the plaintiff.

Dillon & Swayne, and *Melville Eglestone*, for appellant. The proposed answer is conclusive. It states that, whatever may have been true some months ago, the

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defendant has now no right whatever, and can obtain no right to the desired quotations ; that they are the exclusive property of the Chicago Board of Trade, which delivers them to the Western Union Telegraph Co., for the special purpose of transmission only to certain designated persons, and expressly forbids that company to disclose them to plaintiff ; that the defendant receives them from the Western Union Telegraph Co., if at all, for the same special purpose only, and under the same restrictions as those under which they are received by that company. (a) The statute prescribing the duty of defendant and limiting its control, is explicit. "Any person connected with any telegraph company in this state, either as clerk, operator, messenger, or in any other capacity, who shall willfully divulge the contents, or the nature of the contents, of any private communication entrusted to him for transmission or delivery. . . shall, on conviction before any court, be adjudged guilty of a misdemeanor, and shall suffer imprisonment in the county jail or workhouse, in the county where such conviction shall be had, for a term of not more than three months, or shall pay a fine not to exceed five hundred dollars, in the discretion of the court " (3 R. S. [Edm. 2d Ed.] 722 ; see *Penal Code*, § 641). (b) The settled practice of courts of equity is opposed to the demand of plaintiff. "When defendant enters into a contract, the execution of which depends upon the voluntary consent of a third person, and such consent is refused, as there are no legal means of compelling it to be so given, the performance becomes an impossibility, and will not be decreed" (*Pomeroy Spec. Perf.* § 295). In the cases of *Kelly v. G. & S. Tel. Co.*, and *Todd v. Same* (mentioned 17 *Hun*, 551), it was long ago held that the Exchanges had a right to restrict defendant's use of the information obtained from them. The federal courts have taken the same view. BLODGETT, Circuit J.: "As the Telegraph Company enjoyed the privilege only at the will and sufferance of the Board, there can be no doubt of the power of the Board to close

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its doors against the employees of the Telegraph Company whenever it sees fit to do so ; and it necessarily follows that when the Board excludes the Telegraph Company from the Exchange, the company must cease to send reports of prices to complainant" (Metrop. Grain & S. Exchange v. Board of Trade, 15 *Fed. Rep.* 847 ; Marine, Grain and Stock Exchange v. W. U. Tel. Co., 22 *Ib.* 23).

II. The defendant is excused from performance by the provisions of the very contracts themselves under the state of facts now presented. The language of the contracts is : "The Gold and Stock Telegraph Company will furnish to its subscribers as correct. . . produce. . . quotations. . . as it can obtain by the employment of experienced reporters ; but in view of the difficulties inherent in the business, the company will not be pecuniarily responsible for the accuracy of such quotations and reports, nor for errors, delays or omissions in the service."

III. The defendant, under the statute, has a clear right to set up the facts. Generally, a defendant has a right to set up, by supplemental answer, matter of defense which has occurred or come to his knowledge subsequently to the putting in of the first answer (*Code*, § 544 ; *Holyoke v. Adams*, 59 *N. Y.* 233 ; *Spears v. Mayor, &c.*, 72 *Ib.* 443 ; *Lyon v. Isett*, 11 *Abb. Pr. N. S.* 355 ; *Hoyt v. Sheldon*, 4 *Abb. Pr.* 59 ; *Palmer v. Murray*, 18 *How. Pr.* 545 ; *Morrell v. Carelly*, 16 *Abb. Pr.* 269 ; *Stewart v. Isidor*, 5 *Abb. Pr. N. S.* 68).

Simpson & Werner and Richard S. Newcombe, for respondent.—I. The proposed supplemental pleading fails to disclose any defense. It seeks to set up matters between the Board of Trade and the Western Union Co. This same attempt was made in a suit brought by the Public Grain & Stock Exchange against the telegraph Co., in the circuit court of Cook county, Illinois, but judge TULEY delivering the opinion (Oct. 25, 1884), struck the supplemental answer from the files, and disallowed the same. A similar effort was made in the N. Y. court of common

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pleas in a cause exactly like the present one, and resulted in an opinion by the court. ALLEN, J.: . . . "The rights of the parties must be determined by their contract. The directions by the Board of Trade of Chicago cannot excuse the defendants from a performance of their agreement with the plaintiff" (*Hammond v. Gold & Stock Tel. Co.*, *N. Y. Daily Reg.*, March 19, 1885). Leave is never granted where the proposed answer fails to set up a good defense (*Jagger v. Littlefield*, 3 *Week. Dig.* 317; *Morel v. Garely*, 16 *Abb. Pr.* 269; *Goddard v. Benson*, 15 *Ib.* 191).

BY THE COURT.—SEDGWICK, Ch. J.—The present action is not for damages for a breach of the contract. It is, in substance, an action for specific performance of the contract. This is not matter of absolute right. Equity does not always compel specific performance. Circumstances may exist that will justify the court in using its discretion by denying an application for such a judgment. A leading inquiry always is, whether or not the plaintiff can obtain full satisfaction by an award of damages at law. Another, relates to the disposition of a case where the defendants are unable to specifically perform. The usual practice, at least, is not to give such relief. Where the inability arises after the beginning of the action, it must be pleaded, if at all, by a supplementary answer. In a general sense, the defendant appeals to the discretion of the court. As the cause of action is an appeal to discretion, the counter appeal by the other party is, in its nature, a defense, which, upon a hearing, may be maintained by the court. The proposed supplemental answer contains averments of facts which a court would be bound to hear before giving the judgment demanded by the plaintiff. It is not necessary now to say absolutely, that if the facts referred to are proved, the court would be bound to dismiss the complaint. It is enough to say that the defendant has a right to prove facts that tend to show that it would not be equitable to maintain the contract perpetually or that the defendant is unable to perform.

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The order is reversed with \$10 costs and disbursements to be taxed, and the motion below is granted, with \$10 costs to abide event.

FREEDMAN, J., concurred.

SAMUEL CASSON, RESPONDENT, v. AARON FIELD, ET
AL., APPELLANTS.

Factor, as to right to sell.—Requests and exceptions to charge, effect of omissions to make.

A factor, as to right to sell, has no right to sell for advances until the principal fails to pay after reasonable notice.

Where there is a disputed question of fact, and an omission to request submission of it to the jury, the parties are considered as having left it to the decision of the court, and to have submitted to his decision; and on appeal, his decision must be assumed to be such as will support the verdict.

An omission to take an exception to a charge as to a fact, is an admission that the fact is as charged.

This was an action of trover against brokers, founded on an alleged sale by them against instructions, and a demand and refusal; the defense was two-fold (1st) that the goods were sold by plaintiff's order. This was disputed by the plaintiff, and there was no request to submit the disputed question of facts to the jury; (2d) that the goods were sold for the payment of a general balance due for advances. The court charged there was no general balance due, and this was not excepted to. The jury found for the plaintiff. *Held*, that the judgment entered on the verdict should be affirmed.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided June 1, 1885.

Appeal by defendants from judgment entered on verdict of jury, and from an order denying motion for new trial on the minutes.

Action of trover against brokers for an alleged sale against instructions. The defense was (1st) that the

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goods were sold by plaintiff's order, and (2d) that they were sold for a general balance due for advances.

Further facts appear in the opinion.

Edward S. Field, attorney, and *A. Blumenstiel*, of counsel for appellants.

David Tim, attorney, and of counsel for respondent.

BY THE COURT.—TRUAX, J.—It is not necessary for us to determine in this case whether the defendants had or had not a general lien for advances to plaintiff on the particular goods that are the subject of controversy in this action. It is well settled that a factor must obey the instructions of his principal as to the sale of the goods consigned to him, although he has made advances, unless the principal, after reasonable notice, fail to pay such advances (*Hilton v. Vanderbilt*, 82 N. Y. 591; *Manfield v. Goodhue*, 3 *Ib.* 62). The evidence shows that plaintiff consigned certain goods to defendants to be sold by them at a certain price, and that the defendants sold them under that price. It is true that one of the defendants, Field, testified that he sold the goods below the price limited, because the plaintiff told him to sell them at auction for what they would bring, but this evidence was contradicted by plaintiff, and the disputed question of fact was not submitted to the jury. 'By not requesting the court to submit this question to the jury, and by not excepting to the charge of the court that there was no general balance due from plaintiff to defendants, the defendants admitted that there was no general balance due from plaintiff to defendants, and if there was no such balance due them they could have no lien on the goods mentioned in the complaint.'

Therefore, it was their duty to deliver the goods to plaintiff on demand.

The judgment and order appealed from are affirmed, with costs.

O'GOORMAN, J., concurred; SEDGWICK, Ch. J., agreed to affirm.

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WALTER M. HUNT v. THE MAYOR, &c., OF THE CITY OF NEW YORK.

Municipal corporation, e. g. city of New York—Negligence, when not imputable to—Constructive notice to—Latent defect, notice of not presumed.—The American Heating and Power Company.

Negligence is not imputable to a municipal corporation, on account of those defects in its streets which do not arise from their original construction, or are not caused by it or its duly authorized agents, nor on account of an obstruction placed therein by a wrong-doer, without express or constructive notice thereof.

To constitute constructive notice, the defect or obstruction must be so patent that it can be found out by the corporation by the use of reasonable care and diligence. The law does not *presume* notice to a municipal corporation, of a latent defect.

The American Heating and Power Company is not the authorized agent of the city of New York.

Upon these principles, *held*, that the city of New York was not liable for an injury resulting from an explosion caused by the ignition of gas which had accumulated and filled a man-hole in one of its streets, which was constructed and owned by the American Heating and Power Company, there being no evidence that it knew, or ought to have known that the street was, or was likely to get, out of repair.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 1, 1885.

Exception to a dismissal of the complaint ordered to be heard at general term.

This action was brought to recover compensation for damages which the plaintiff alleges he sustained through the negligence of the defendant. The facts are these: As the plaintiff was passing along Broadway near Maiden Lane, there was an explosion in and under the surface of the street in said Broadway. The explosion was caused by the ignition of gas which had accumulated and filled a "man-hole," which was constructed and owned by The American Heating & Power Company, a company authorized to "lay pipes in the city of New York, with the consent of the city and under such reasonable regulations and

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conditions as it may prescribe" (ch. 317, *Laws* 1879). This consent was given by the city.

On the trial, the court dismissed the complaint, and the plaintiff excepting, the court ordered the exception to be heard in the first instance at general term.

E. H. Benn, attorney, and of counsel for plaintiff, on the questions considered in the opinion, argued :—I. It is the duty of the city to have the streets at all times in a safe condition for travelers (*Ehrgott v. Mayor*, 96 *N. Y.* 271; *Hume v. Mayor*, 74 *Ib.* 264). The steam company could not have laid its pipes in the streets without permission of the city. That permission was given, and the city stipulated for a compensation or profit therefor. The very fact that the city was to derive a profit from the work made the city liable, the same as if the work had been done by the city itself.

II. Besides, by the act of 1879, the city was required to prescribe reasonable regulations and conditions under which the work was to be done. Yet, the city did nothing of the kind, and the work was improperly done. No regulations or conditions in relation to laying the pipes or doing the work were prescribed by the municipal authorities; the conditions were simply that the company should furnish a map, give the city a bond to protect the city, and to replace the pavement, allow the city to change the positions of the pipes, furnish the city with steam at its (the city's) own price, make an annual report, and pay the city three cents for each lineal foot of mains laid, and two per cent. of the net profits. That is not what the statute required, and by this neglect and omission of duty by the municipal authorities the company was allowed to lay the pipes as it pleased, without any restraint or restrictions in regard to the manner, or execution of the work, and the explosion was the consequence. The city is liable for that reason (*Wendell v. Mayor*, 4 *Keyes*, 261; *Hume v. Mayor, &c.*, 74 *N. Y.* 274; *Wilson v. City of*

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Watertown, 3 *Hun*, 508 ; Deyoe v. Village of Saratoga Springs, 3 *T. & C.* 504 ; Hutson v. Mayor, 9 *N. Y.* 163).

E. Henry Lacombe, counsel to the corporation, and *John J. Townsend, Jr.*, of counsel for defendants, on the questions considered in the opinion, argued :—I. No doubt the steam pipes could only be laid in the streets with the consent of the city authorities and “under such reasonable regulations and conditions as they may prescribe.” Even if the common council did not exercise that legislative discretion in a proper manner, that the city, for such failure, would not be liable, is elementary (*Griffin v. Mayor*, 9 *N. Y.* 456).

II. The laying of the steam pipes was made lawful by the legislature, so that even if the pipes developed into a nuisance, the city would not be liable until it had notice, actual or constructive, of the nuisance. Then again, the cause of this accident, even if strictly speaking, it can be classed as a “defect in the highway,” was from its subterranean nature singularly “latent,” and difficult to be anticipated ; and in such case a municipal corporation is not liable without actual or constructive notice (*Hart v. City of Brooklyn*, 36 *Barb.* 226 ; *McKenna v. Mayor*, 47 *Super. Ct.* 541 ; *Masterson v. Mt. Vernon*, 58 *N. Y.* 391). The plaintiff, however, contends that the city's liability is extended beyond the rule laid down above, by reason of the provision of chapter 317 of the laws of 1879. (The counsel here commented on and distinguished the cases of *Wendell v. City of Troy*, 4 *Keyes*, 261 ; *Wilson v. City of Watertown*, 3 *Hun*, 508.)

But the city does not concede that the statute imposed upon it any duty to supervise the actual construction of the steam heating pipes, except so far as to see that the highway was properly cared for. And that this duty was not performed there is no pretense. A mere perusal of the statute fortifies this view of the limited extent of the duty imposed. The statute gives an absolute power to the company to lay the pipes upon obtaining the consent

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of the municipal authorities, and if it had been intended by the legislature to require the latter to supervise the engineering of the scheme—a novel duty—some such provision would have appeared in the act. That such a duty is novel, see *Hume v. Mayor* (47 *N. Y.* 639); *McDermott v. City of Kingston* (19 *Hun*, 198).

BY THE COURT.—TRUAX, J.—The defendant owes to the public the duty of keeping its streets in a safe condition for the use of travelers, and is liable in a civil action for special injury resulting to one using its streets in the usual manner, from neglect to perform this duty (*Ehrgott v. Mayor*, 96 *N. Y.* 264). But before the city can be held to be negligent, on account of a defect in its streets (not arising from their original construction, and not caused by the city, or by its duly authorized agents), or on account of an obstruction placed in its streets by a wrong-doer, either express notice of the existence of the defect or obstruction that was the cause of the injury, must be brought home to the defendant, or such defect or obstruction must be so patent that the defendant could have found it out if he had used reasonable care and diligence (*Mayor, &c. v. Sheffield*, 3 *Wall.* 195; *Griffin v. Mayor*, 9 *N. Y.* 456; *McGinity v. Mayor*, 5 *Duer*, 674; *Smith v. Mayor*, 66 *N. Y.* 295). It therefore follows that the defendant can be held only for the damage sustained by the plaintiff through the neglect of the defendant, either in laying the pipes, or in keeping the street in proper repair after the pipes had been laid. The defendant was not negligent for the manner in which the pipes were laid, because they were not laid by the defendant or its authorized agents (*Griffin v. Mayor*, 9 *N. Y.* 461); nor was it negligent for not keeping its streets in repair, because there is no evidence that the defendant knew, or ought to have known, that the street was out of repair, or was likely to get out of repair (*McKenna v. Mayor*, 49 *Super. Ct.* 541; *Masterton v. Mt. Vernon*, 58 *N. Y.* 391). We cannot presume that the defendant had notice of a

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latent defect in the street, when the defect was not made by it or under its direction, for the law does not require the authorities of the city to be experts, skilled in mechanics and architecture, but requires of them only reasonable intelligence and ordinary care and prudence (*Hart v. City of Brooklyn*, 36 *Barb.* 226 ; *Hume v. Mayor*, 47 *N. Y.* 639 ; *S. C.*, 74 *N. Y.* 264).

The plaintiff's exception is overruled, and judgment is ordered for the defendants, with costs.

SEDGWICK, Ch. J., and FREEDMAN, J., concurred.

JOHN NEWMAN, APPELLANT, v. EDMUND C. MARSHALL, RESPONDENT.

Assault and battery, instigator present—justification, claim of right to possession when not.—Tenant-at-will, notice to quit.—Submission to jury, right to.

One who is present and instigates and encourages those who actually use physical violence is liable for assault and battery.

A tenant-at-will is entitled to at least reasonable notice to quit. A notice to leave forthwith is not sufficient, especially when accompanied with a notice to get his personal property together and remove it.

Parties committing an assault and battery and expelling from possession by force, one asserting by re-entry his right to possession after his rightful prior possession had been by them wrongfully entered upon, cannot justify their action under a claim of right to possession.

The plaintiff being in possession of premises, having been allowed by the defendant, under an agreement with him, to go into possession for the purpose of doing business there, and having therein considerable personal property, upon a demand being made by defendant (who claimed the right to immediate possession) to forthwith give up possession and get his personal property together and remove it, asserted his right to remain, and went to the front door for the purpose of giving a message to a boy to take to his lawyer, and then the defendant and those acting with him shut the door and barred him out, whereupon he went to a back door, broke it open and entered, and thereupon the defendant and those with him, or those with him, instigated and encouraged by him, he being

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present, assaulted the plaintiff and put him out by force; for which assault and battery the action was brought.

Held, that the complaint was improperly dismissed, that as these facts did not incontrovertibly show that the plaintiff had voluntarily abandoned possession to the defendant, and as there was evidence to the effect that defendant pushed plaintiff, and also to the effect that he was present and instigated the assault and battery by others, the plaintiff was entitled to a verdict of the jury as to whether he had abandoned possession before he attempted to re-enter through the back door, and as to whether the defendant was guilty of assault and battery.

Before SEDGWICK, Ch. J. and O'GORMAN, J.

Decided June 1, 1885.

Appeal by plaintiff from judgment for defendant, dismissing complaint, entered upon a direction at trial term.

The action was for assault and battery. The facts sufficiently appear in the opinion.

William J. Hardy, attorney, and of counsel for appellant, as affecting the questions considered in the opinion argued :—I. Where several unite in an assault and battery, all are equally responsible for the entire damages; one cannot excuse himself by showing the insignificance of his participation, as compared with that of the others; and the person injured can elect which particular one of the number he will sue to the exclusion of the others; he may sue any or all (*Cooley on Torts*, 134; 2 *Greenl. Ev.* § 621; *Bishop v. Ely*, 9 *Johns.* 294; *Hume v. Oldacre*, 1 *Stark.* 351; *Bell v. Morrison*, 27 *Miss.* 68).

II. It was assault and battery to lay hands upon the plaintiff with intent to eject him from his tavern. He was at least tenant at will, and the defendant, lessee, could not repossess himself of the premises as against such a tenant, either by force or otherwise, until the expiration of at least thirty days' notice to quit, under the statute (3 *R. S.* [7 ed.] p. 2201, P. II., C. I., T. IV., § 7; *Jackson ex d. Livingston v. Bryan*, 1 *Johns.* 322; *Larned v. Hudson*, 60 *N. Y.* 104). But the 1st May, 1883, having passed without the duration of plaintiff's occupancy of said

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premises after said date, being specified between the parties, the defendant became a tenant for one year to May 1, 1884 (2 *R. S.* [7 ed.] p. 2200, § 1; *McAdam Landlord & Tenant*, 32-36; *Tuomey v. Dunn*, 42 *Super. Ct.* 291; *Washburn Real Prop.* 512; *Jackson ex dem. Livingston v. Bryan, supra*). The entry by defendant with intent to deforce plaintiff, was trespass (*Littlejohn v. Attrill*, 94 *N. Y.* 619; *Cooley on Torts*, 316, and cases; *Six Carpenter's Case*, 8 *Co.* 290; *S. C.*, 1 *Smith's L. C.* 216; 2 *Bl. Com.* 212, 213). When plaintiff was locked out of his front door he did not lose his possession; for his absence was temporary, and he left his goods and servants upon the premises, and his entry at the side door was rightful (*Cooley on Torts*, 322, 324, and cases; *Littlejohn v. Attrill, supra*; 1 *Phillips Ev.* 201; *Greenl. Ev.* § 108). Whether he had once lost his possession or not, when the plaintiff had again promptly effected actual entrance into his premises, his presence there was lawful and of right, and his use of force to get in could not qualify his legal right to remain there (*Hyatt v. Wood*, 4 *Johns.* 150; *Estes v. Kelsey*, 8 *Wend.* 555; *Filkins v. People*, 69 *N. Y.* 101, 105; 1 *Washburn Real Prop.* 530, §§ 30, 537, 539; *Jackson ex dem. Stansbury v. Farmer*, 9 *Wend.* 201; *Ives v. Ives*, 13 *Johns.* 235; *Wilde v. Cantillon*, 1 *Johns. Cas.* 123; *Wood v. Phillips*, 43 *N. Y.* 157). There can be no forcible entry as against a mere trespasser, for where the rightful occupant asserts his rights promptly, the trespasser cannot acquire even naked possession (*Cooley on Torts*, 322, 324, cases cited, and authorities, *supra*). And, as a question of civil rights (as distinguished from the rights of the people), at issue in a civil court in a civil action, the plaintiff would have been fully justified in using force to defend his possession and his goods, and even to put the defendant and his party out of the place (*Bliss v. Johnson*, *N. Y.* 534; *Cooley on Torts*, 322, 324, cases and authorities, *supra*). And the plaintiff, when he had entered his side door, being in actual possession of premises to which he had the right of possession, the act of

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the defendant and his confederates in thrusting him out, was an assault and battery (*Woods v. Phillips*, 43 N. Y. 157).

George W. Savage, attorney, and *John D. Townsend*, of counsel for respondent, as bearing on the questions considered in the opinion, argued :—I. The plaintiff, upon the evidence, was a tenant at will, and, had he required it, would have been entitled to a month's notice in writing before he could have been deprived of possession (*Larned v. Hudson*, 60 N. Y. 104; 3 R. S. 2201, § 7, *Banks'* 7th ed).

II. The plaintiff was not forcibly evicted. He left the premises of his own volition, after full knowledge that the defendant had sold them to another party, and had demanded possession.

III. Being thus out of possession the plaintiff had no right to use force in attempting to regain possession of the premises (*Pollen v. Brewer*, 7 C. B. [N. S.] 371; *Parsons v. Brown*, 15 Barb. 590; *Sampson v. Henry*, 11 Pick. 387).

IV. As matter of fact, the defendant himself neither assaulted the plaintiff nor aided or abetted any one else in doing so.

PER CURIAM.—The learned judge below, on all the testimony, dismissed the complaint. So far as this was done on the ground that there was no evidence that the defendant made either an assault or battery upon the plaintiff, two things are to be said. First, there was some testimony that the defendant pushed the plaintiff. Second, although the greater part of the violence done to the plaintiff, as he testified, was done by others than the defendant, there was testimony enough to take the verdict of the jury as to whether the defendant, being present, did not instigate and encourage those who actually used physical violence upon the plaintiff. If he did, in legal effect he was guilty of assault and battery.

The important question is whether the persons who

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used the force upon the plaintiff, were justified in that, upon the ground that there was no more force used than was necessary to prevent the plaintiff entering into possession of premises, of which the defendant or his vendee were rightfully in possession, while the plaintiff had no right of possession. The premises referred to were a bar-room, which had fixtures belonging to plaintiff, and another room opening into the bar-room. There was there other property belonging to the plaintiff. The defendant was a lessee of the premises. By an agreement it clearly appeared that the defendant had allowed the plaintiff to go into possession of the premises for the purpose of doing business there. The plaintiff was in possession in his own right, and not as servant or agent of the defendant. On a day in February, the defendant, without any former notice to the plaintiff to remove from the premises, entered them in company with several others and told the plaintiff that he must leave at once, he the defendant having sold the place to one of the persons. The plaintiff asserted that the place was his, and he had a right to remain. He in no way yielded or acquiesced in the demand made by the defendant, unless he did so by the following conduct on his part:—For the purpose of giving a message to a boy, to be taken to his lawyer, he went to the front door and stood near it for a moment, when those on the inside shut the door and locked it. These facts do not incontrovertibly show that the plaintiff voluntarily abandoned possession to the defendant. There are some strong indications to the contrary. At least the verdict of the jury have been taken on this point. If the plaintiff did not voluntarily abandon or surrender the possession of the premises, the defendant or his vendee did not go into possession.

On the facts, that in this case show the rights of the opposing parties, it would seem that the plaintiff's right to possession had not been ended by the notice to leave at once, but could be ended only upon giving a reasonable time within which to remove. If other facts were known,

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it might be possible to say whether the law had fixed the time of notice. It is only necessary now to say that notice to leave forthwith was not enough, the plaintiff being in by consent of defendant, and not therefore, a trespasser or anything of that nature.

On the notice that was given, as it was accompanied by a notice to the plaintiff to get his property together, he would be rightfully in possession until a time proper for such a transaction should pass. But it seem clear from any point of view that he had not left the possession.

On the front door being locked, he went to a back door to the rooms, broke it open and entered. Forthwith, the parties inside attacked him, used the violence that has been referred to, and forced him outside of the door, and the vendee of the defendant has remained since then in occupation. As it has been determined that the plaintiff had not gone out of possession and the defendant or his vendee had not entered into it, or that it does not appear so uncontrovertibly, the defendant's violence, if he were guilty of it, was used to put the plaintiff out of possession by force, and this was illegal, and the force was not used to prevent the plaintiff entering forcibly upon the defendant's possession.

There were facts that entitled the plaintiff at least to a verdict of the jury as to whether he had left or abandoned possession, before he attempted to re-enter through the back door, and as to whether the defendant was guilty of assault and battery.

Judgment reversed, and a new trial ordered, with costs to abide event.

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**BERTHA WUESTHOFF, ET AL., BY GUARDIAN AD LITEM,
AND EMMA WUESTHOFF, APPELLANTS, v. GER-
MANIA LIFE INSURANCE COMPANY, RESPOND-
ENT.**

Life insurance—notice and proof of death by or on behalf of those entitled to receive payment.—Estoppel in pais.—One who takes a benefit or advantage of an act of another is estopped against questioning consequences.—Infancy.

Under an insurance policy upon the life of one Frederick Wuesthoff, payable on the death of his wife Amalia, before him, to "her children" (the plaintiffs herein), or to their guardian if under age, payment to be made in sixty days after due notice and proof of the death of said Frederick, Eliza Fredericka, the second wife of said Frederick, served on defendant a notice and proof of death, signing them "as guardian of the children of the deceased Amalia," and claiming the ownership of the policy as such guardian, and thereupon defendant paid to her the amount of the policy. No other notice and proof of death was served.

Held, in this action to recover the amount of the policy :

- (1) That if it was claimed by plaintiffs that the notice given was not given on behalf of them, then the notice intended by the policy had not been given, for the defendant was entitled to notice given by, or on behalf of, those entitled to receive payment; and it not having been given on behalf of plaintiffs, they could not ratify.
- (2) That if the plaintiffs take advantage of the notice, thus affirming the exercise by Eliza Fredericka of authority over the policy as owner, the consequence, to wit; its payment to her, must also be affirmed.
- (3) That the complaint was therefore properly dismissed.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided June 1, 1885.

Appeal by plaintiffs from judgment dismissing complaint entered upon findings and conclusions by a judge trying, by consent, the issues without a jury.

The plaintiffs were the children of Frederick Wuesthoff and his wife Amalia. The action was upon a policy of insurance upon the life of the said Frederick Wuesthoff, in the sum of \$5,000. It provided that "in case of

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the death of the said Amalia, before the decease of the said Frederick Wuesthoff, the amount of the said insurance shall be payable, after her death, to her children, for their use, or to their guardian if under age, payment to be made in sixty days after due notice and proof of the death of the said Frederick as aforesaid." The wife Amalia, died before her husband Frederick, died. At the time of his death, he was a resident of the state of New Jersey. He left a will, afterwards duly proved, by which he made his second wife, Eliza Fredericka Wuesthoff, the guardian of the persons and of the property of the persons who are now the plaintiffs. The statutes of New Jersey enact that "every guardian appointed by last will and testament, which shall be legally proved and recorded, shall, before he exercises any authority over the minor or his estate, appear before the orphans' court and declare his acceptance of the guardianship, which shall be recorded, and shall give bond, with such sureties and in such sum as the said court may approve of and order, for the faithful execution of his office, unless it is otherwise directed by the testator's will." The will contained no direction on the subject. Eliza, the guardian named in the will, did not declare the acceptance of the guardianship or give bond under the statute. After the proof of the will, she served upon the defendant notice and proof of death of said Frederick, signing them as "guardian of the children of the deceased." In the notice, &c., was the question: "By what right do you claim the ownership of the policy?" Her answer was as written, "as guardian of the children of the deceased." The defendants thereupon paid to her the amount of the policy, she then surrendering to them the policy itself, of which she had possession. No other notice and proof of death or demand for payment was given or made to the defendants before action brought, and such fact was set up as a defense in the answer. The plaintiffs claimed that the payment to Eliza, as guardian, was not a payment according to the terms of the policy,

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for the reason that she had not complied with the statute that has been cited.

The judge below dismissed the complaint.*

** Guardian of infants, contract to pay to—existence of a general guardian necessary to maintain action on behalf of infant plaintiffs.—Joint promise to infant and adult plaintiffs—action on cannot be maintained where there is no general guardian for the infant plaintiff.*

At special term, the complaint was dismissed, on the ground that there was no general guardian in existence who was entitled to receive payments for the infant plaintiffs, INGRAHAM, J., writing as follows:—

“The first question to determine in disposing of this action is, what contract did the defendant make? what did it agree to do?

“By a policy of insurance, the defendant, in consideration of \$164.25 to it in hand paid by Amalia Wuesthoff, wife of Frederick Wuesthoff, and of further annual premiums to be paid, assured the life of Frederick Wuesthoff, for the sole use of the said Amalia Wuesthoff, in the amount of \$5,000, and agreed with said Amalia Wuesthoff, to pay the said sum to Amalia Wuesthoff within sixty days after due notice and proof of death, ‘and in case of the death of the said Amalia Wuesthoff, before the decease of said Frederick Wuesthoff, the amount of the said insurance shall be payable after her death to her children for their use, or to their guardian if under age.’ Amalia Wuesthoff having died before Frederick, the amount of the insurance on his death was payable to her children. The children being minors at the time of the death of the insured, to whom, under the policy, was the company bound to pay? Not the children, for they were incapable of receiving the money or releasing the company from its obligations, and in express terms the policy provided that in such a case the payment was to be ‘to their guardian.’ In *Price v. Phoenix Insurance Co.* (17 Minn. 498), cited by plaintiff, the court says that the words ‘payable to the guardian’ give the defendant the privilege, and make it its duty, to pay the sum assured to such guardian. A payment, therefore, under this policy, to any one but their guardian would not have satisfied the obligation of the policy, and discharged the defendant on the policy. It appeared on the trial, that Frederick Wuesthoff died in 1877, leaving a last will, whereby he appointed Eliza F. Wuesthoff, guardian of his children. The will was duly admitted to probate as required by the statute of New Jersey, where Frederick and his children resided. And under the statute of New Jersey such appointment was valid, and constituted the said Eliza F. Wuesthoff the guardian of the children, and such guardian was authorized by the statute to take into her hands, for the use of such child or children, the goods, chattels and personal estate of such children (Revised Statutes of New Jersey, § 1, p. 464). A subsequent section of the statute (§ 48, p. 762), provides, however, that every guardian appointed

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Beaman, Mayer & Walrath, attorneys, *Charles B. Mayer* and *Frederick B. Walrath*, of counsel for appellants, argued:—I. (On the point on which the general term decided.) Due notice and proof of death, as required by the policy, was given to the defendant. There is no requirement in the policy that notice of death shall be

by last will and testament, shall, before he exercises any authority over the minor or his estate, appear before the orphans' court and declare his acceptance of the guardianship, which shall be recorded, and give bonds, etc., unless it is otherwise directed by the testator's will. This was not done, and it is claimed by plaintiffs that in consequence of such omission, the defendant was not authorized to pay the amount of the policy to the person appointed guardian by the will of the deceased.

"But if defendant was not authorized to pay to such guardian, to whom was it authorized or required to pay? The agreement was to pay to the children's guardian; and a guardian was appointed in the manner required by law, but according to plaintiffs' theory was not qualified to receive the infants' estate. No statute of New Jersey was proved which authorized the defendant to apply for the appointment of a guardian of the children, and I know of no rule of law that requires it to provide a person qualified to receive the money, as well as to pay it to such persons when qualified to receive it, and until such guardian had been appointed and qualified, I do not see how the defendant can be said to be in default. If there had been a guardian duly appointed and authorized to receive the fund, and the company had refused to pay, it is now settled in this state that the infants could sue by their guardian *ad litem* (*Segelken v. Meyer*, 94 N. Y. 473); but that does not dispense with the necessity of there being a person in existence to whom the obligor would be by the terms of the obligation authorized to pay before it could be said to be in default. In *Wangler v. Swift* (90 N. Y. 38), it was held that where a thing to be done lies more properly within the cognizance of the plaintiff than of the defendant, notice that such thing had been done ought to be given to the defendant, and such notice was a condition precedent to the defendant's liability. In that case, the person to whom the payment was to have been made was determined, but the amount to be paid was in doubt; in this case the amount is fixed, but the person to whom it is to be paid is uncertain, and until such person is appointed, notice thereof given to the defendant; and a demand made on it, there could be no breach, and consequently, no right of action.

"The obligation sued on is joint. The action is at law to recover the amount of the policy, and I think, for the reasons above given, that no cause of action has been shown against the defendant, and the complaint must be dismissed, with costs."

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given by any particular person. The essential thing is that the insurer shall *receive* due notice of the death, and it can in nowise be essential by whom that notice is given, or how its information is obtained. The notice may be given by an entire stranger. And when the information has been seasonably communicated, the requirement of the policy has been fulfilled, to wit: "Due notice. . . . of death has been given to the company" (*May on Insurance*, §§ 465, 466, 512; *Guardian Life Assu. & Trust Co.*, 9 *Weekly Notes of Cases*, 425; *Eclipse Insurance Co. v. Schoener*, 2 *Cin. Supr. Ct.* 474; *Taylor v. Selna Life Ins. Co.*, 13 *Gray*, 434; *Day v. Mutual Ben. Life Ins. Co.*, 1 *McArthur*, 600; *Hincken v. Mutual Ben. Life Ins. Co.*, 6 *Sand.* 24; *Northwestern Ins. Co. v. Atkins*, 3 *Bush*, 333). If the death occur in the presence of the board of directors, or of an officer of the company competent to receive proof, or if the company of its own motion obtain the information, that fact alone operates as *due notice* to the company (*Kennedy v. Home Ins. Co.*, 9 *Ins. L. J.* 359). The law is reasonable, and does not require that to be done which is unnecessary. Eliza F. Wuesthoff, being the widow of the deceased, and the stepmother of the beneficiaries, was a proper party to give notice of such death, under any and all circumstances. If it could by any possibility be construed as an obligation on the part of the *beneficiaries* to give the notice, then it was proper to communicate the information through an agent. Such agent was their stepmother, whose act, in giving notice, they have ratified (*Sims v. State Ins. Co.*, 47 *Mo.* 60). The case of *Bliss v. Cottle* (32 *Barb.* 322), with others cited by defendant's counsel, was an action in tort for conversion, and refers to *demand*, not *notice*. The plaintiffs were not required to make a demand in this case, hence do not ratify any demand of their stepmother—if she made such. And even in the extreme cases where, by the terms of the policy, personal notice by the insured was required to be given, the acceptance of the notice and proofs of loss from another, without objection, has been

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held to be a waiver of the right to require personal notice from the insured (*Reilly v. Guardian Mut. L. Ins. Co.*, 60 *N. Y.* 172; *Sims v. State Ins. Co.*, 47 *Mo.* 60; *Farmers' Mut. Ins. Co. v. Graybill*, 74 *Pa. St.* 17; *Kernochan v. Bowery F. Ins. Co.*, 17 *N. Y.* 433; *Pratt v. N. Y. Cent. Ins. Co.*, 55 *Ib.* 506; *Bodle v. Chenango Co. Ins. Co.*, 2 *Ib.* 58). The payment of the amount of the policy (notwithstanding it was made to the wrong person) was a waiver of the right to raise any objection to the manner of giving the notice and proof of death. It was held, that the sufficiency of preliminary proof was admitted by the mere act of bringing the money due upon the policy into court (*Johnson v. Columbia Ins. Co.*, 7 *John.* 315).

II. (On the point on which the special term decided.) This suit was properly brought by the plaintiffs, they, as infants, being represented by their guardian *ad litem* (*Segelken v. Meyer*, 94 *N. Y.* 473). The appointment of a general guardian was not a condition precedent to the cause of action arising in favor of the plaintiffs. The contract, as evidenced by the policy, was to pay *them*, and the addition of the words "their guardian if under age," did not make it obligatory upon them to have a guardian as a condition precedent to recovery. These words did not modify the contract, but were simply surplusage. The policy was for their benefit, and the guardian is their representative and not a principal in the contract. The infants should sue as beneficiaries by their next friend, or guardian *ad litem*, and the judgment, in the event of recovery, will be entered in *their* favor (*Higgins v. Hannibal & St. Jo. R. R. Co.*, 36 *Mo.* 418; *Balto. & Ohio R. R. Co. v. Fitzpatrick*, 36 *Md.* 619). Under a policy of life insurance, payable "to their children, for their use, or to their guardian if under age," which is the same language as that contained in the policies in this case, it was held notwithstanding the objection that the cause of action was in the general guardian, that the children were the real parties in interest, and that the suit was properly brought in their names by

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their guardian *ad litem* (*Price v. Phoenix M. L. Ins. Co.*, 17 *Minn.* 500). The interest in the policy vested in the infants immediately upon the death of their father. So held, under a policy of the N. Y. Life Ins. Co. identical in form with the policy in evidence (*Clemmitt v. N. Y. Life Ins. Co.*, 76 *Va.* 360). And it is apparent that in neither of these cases had a general guardian been appointed. The same doctrine was held in cases where obligations to pay ran to other representative parties, as, for example, an agreement "to pay to the treasurer of the commissioners" was held to be a contract to pay the commissioners which must be declared upon by them and not the treasurer (*Piggott v. Thompson*, 3 *Bos. & P.* 149). So also on a contract to pay A. B., agent of the proprietors, etc. (*Gilmore v. Pope*, 5 *Mass.* 491). To the same effect (*Taunton Co. v. Whiting* (10 *Mass.* 327). So also on an agreement to pay to directors, their successors or assigns (*Bayley v. Onondaga Ins. Co.*, 6 *Hill*, 477, and cases cited). So also on a "policy for loss, if any, payable to (the broker) only" (*Lane v. Columbus Ins. Co.*, 2 *Code R.* 65). If the contract was not with the guardian as beneficiary, then there was no necessity for the appointment of a guardian in order to give the real beneficiaries a cause of action. The only purpose then of the appointment of a guardian, is that he may receive property belonging to the infant, and take the custody and management thereof. If there be no property to receive into his custody, there is no occasion for the appointment of a guardian. If an infant simply has a claim which is disputed, when that claim is perfected by a judgment, and about to be paid, it will be in sufficient season to procure the appointment of a general guardian to receive the money into his custody and management. And rather than that the action by the infant should fail, the courts could appoint a general guardian during the pendency of the action. The guardian *ad litem* may become such by filing security (*Code*, § 474; *Rule*, 51).

Respondent's points.

Salomon & Dulon, attorneys, and *Edward Salomon*, of counsel for respondent, argued :—I. (On the point on which the general term decided.) The complaint was properly dismissed, because no notice and proof of death were ever given to the defendant by the plaintiffs, or in their behalf, except those of Eliza F. Wuesthoff, as their guardian, whose action as such they seek to repudiate (*Paley Agency*, by Lloyd, 171, 172 [343 to 346]; *Right ex dem. Fisher v. Cuthell*, 5 *East*, 49; *Cole v. Ball*, 1 *Camp.* 478; *Coore v. Calaway*, 1 *Esp.* 115; *Freeman v. Boynton*, 7 *Mass.* 483; *Bank of Utica v. Smith*, 18 *Johns.* 230). The rule of law that “*omnis ratihabitio retro trahitur et mandato priori æquiparatur*,” seems only applicable to cases where the conduct of the parties on whom it is to operate cannot, in the meantime, depend upon whether there be a subsequent ratification (*Bliss v. Cottle*, 32 *Barb.* 322, and cases there cited; *Story Agency*, §§ 244, 245). In the case at bar the object and effect of the notice and proof of death under the policy is to fix the time of payment, and to subject the company to damages by way of interest, if payment is not made accordingly. Service of such notice and proof comes clearly within the rule of the above authorities. If Mrs. Wuesthoff was not the plaintiffs’ guardian, her notice and claim was unauthorized, and cannot inure to the plaintiffs’ benefit and the defendant’s injury.

The notice and proof of death were given by Mrs. Wuesthoff as guardian for the plaintiffs, and she therein expressly states: “that the undersigned is the legal owner of said policy, and has a good and valid interest to the amount assured in the life of said deceased.” It was acted upon in good faith by the defendant, who paid the money accordingly to her as guardian, and has spent its force. It was made and served by and for her benefit as guardian, and has served its purpose. It is *functus officio*. It would be contrary to all justice and well-known rules of law to allow the plaintiffs to repudiate her act as guardian, and at the same time base upon it a right of action.

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Such a thing would be a novelty in the jurisprudence of this country. The plaintiffs cannot be permitted to adopt this notice in part and repudiate it in part; they cannot in the same breath adopt and repudiate the guardianship of Mrs. Wuesthoff.

None of the authorities cited by plaintiffs' counsel in the court below support the proposition that no notice from the plaintiffs to the defendant was necessary, or that the plaintiffs, while repudiating Mrs. Wuesthoff's authority as guardian, can claim under her notice a right of action, while the defendant has once acted upon that notice in good faith in paying the policy to her. The cases cited are cases of waiver not applicable here. But amongst the numerous authorities there cited against this point, the following strongly support the defendant's position (*May Insurance* §§ 463, 465; *Reilly v. Guardian Mutual Ins. Co.*, 60 N. Y. 172; *Kernochan v. N. Y. Bowery Fire Ins. Co.*, 17 N. Y. 433). In the case at bar nothing has been done by the defendant to warrant the court to hold that they have waived "due notice."

II. (On the point on which the special term decided.) The complaint was properly dismissed, because, except Mrs. Wuesthoff, no general guardian of the plaintiffs, or any guardian authorized to receive payment of the policy, has ever existed. (a) The agreement of the defendant in its policy is, in case of death of Amalia Wuesthoff before that of her husband, to pay the amount of the insurance "to her children for their use, or to their guardian if under age." Until the existence of such a guardian, therefore, authorized to receive the money, there can be no default in the defendant's obligation. Assuming that the amount had become payable, for instance, that the notice and proof of death had been waived by the company in a given case, yet, so long as there is no guardian in existence authorized to receive payment, and until such guardian had made a demand, the company could not be held to be in default (*Code Civ. Proc.* §§ 2822, 2823, 2825, 2826, 2827, 2838, 2839, 2840). (b) *Price v. Phoenix Mut.*

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Life Ins. Co. (17 *Minn.* 497), cited by plaintiffs' counsel in the court below, is to the effect that where a right of action exists in the general guardian, *i. e.*, where a general guardian is in existence, and a company in default in not paying him, the action may be brought by the infant as the real party in interest, appearing by guardian *ad litem*. The same rule exists in this state (*Segelken v. Meyer*, 94 *N. Y.* 473). But it is nowhere held that where no general guardian is or has been in existence, to whom payment could be made, an action could be maintained by the infant. *Williams v. Storrs* (6 *Johns. Ch.* 353), and *Wangler v. Swift* (90 *N. Y.* 38), are direct authorities in support of the position that the existence of a general guardian, and notice thereof to the defendant, was a condition precedent to the defendant's liability, and clearly sustain the judgment of dismissal. (c) This point of the non-existence of a general guardian for the infant plaintiffs, affects equally the adult plaintiff; because, 1st, The action is a joint action; 2d, The promise or covenant in the policy is to the adult and the guardian of the infant children jointly (1 *Bliss Code*, 220, 234; *Pearce v. Hitchcock*, 2 *N. Y.* 388; *Tinslar v. Malkin*, 12 *Week. Dig.* 530; *Jones v. Felch*, 3 *Bosw.* 63; *Code*, §§ 446, 448).

Counsel on both sides, and also *Chamberlain, Carter & Hornblower*, of counsel for the New York Life Insurance Company, by leave of the court, argued at general term, as to the effect of the will of Fredericka Wuesthoff, deceased, of the laws of New Jersey, and of the non-compliance of Eliza Fredericka therewith.

PER CURIAM.—The learned counsel for the appellant claims that by virtue of the statute of New Jersey that has been cited, Eliza F. Wuesthoff had no power to exercise any authority over the estate of the minors. On the assumptions made in this action on behalf of the minors, they had an interest in the policy, and the policy was part of their estate. Eliza F. Wuesthoff exercised authority over the policy, claiming to be the owner of it, and giving

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in the course of making that claim, the only notice and proof of death that have been given to the defendants. Under the terms of the policy, the plaintiff, to recover, was bound to prove that there had been made the notice and proof of death intended by the policy to be a condition precedent to the obligation of the company to pay.

The plaintiffs take the position that the proof and notice of death that were given, inure to their benefit in this action. Without this, there would be no proof of the performance of the condition precedent referred to. If, however, they take the advantage of the notice, they must take it as it was in fact, by affirming the relations in which it was given, viz.: as a notice given by Eliza, as guardian under the will, exercising authority over the minors' estate. When this exercise of authority over the policy as owner is affirmed, the consequence in its payment must also be affirmed (*The Farmers Loan & Trust Co. v. Walworth*, 1 N. Y. 433, and cases cited). The principle is like that that prevents a partial ratification of an agent's acts (*Story Agency*, § 250).

If the notice given was not given in behalf of the plaintiffs, then, in favor of the defendants, who were entitled to notice given by or on behalf of those who were entitled to receive payment of the policy, the notice intended by the policy has not been given, for the plaintiffs cannot ratify a notice not given in their behalf (*Hamlin v. Sears*, 82 N. Y. 331; *Story Agency*, §§ 251 a, 246, 247).

Judgment affirmed, with costs.

Statement of the Case.

PETER BORN, APPELLANT, v. HENRY SCHRENKEISEN, ET AL., RESPONDENTS.

Vacating judgment and allowing answer to be amended to present new issues—power of court—proper exercise of discretion—terms.

The complaint alleged the making in writing by defendants of two certain agreements, whereby they promised to pay certain royalties, to amount to not less than \$600 per year on chairs to be manufactured under a patent, and prayed for an account. The answer was in effect a general denial. On the trial, plaintiff put in evidence said agreements, and the defendants offered evidence to show that the writings did not express the true agreement, and to show that the true agreement was that if they did not manufacture at least 600 chairs a year, the promise to pay royalties should be null and void, which was excluded. The case then turned on the construction to be given to the instruments upon their face. The court held at special term that the proper construction was that defendants were bound at all events, to pay \$600; and that the agreement to pay royalties was to be null and void only at plaintiff's option. The decision was affirmed at general term. Thereupon the defendants moved, among other things, to vacate the judgment, and for leave to amend their answer so as to present new issues. The moving papers detailed the transactions between the parties as defendants understood them, which substantiated their claim as to the agreement, and also showed that the defendant who wrote the modification (and that there was some modification agreed on is beyond controversy), of the original agreement which it was held bound the defendants to pay \$600, at all events, was a foreigner, and not thoroughly master of the idioms of the English language; and also showed that plaintiff had acquiesced in the abandonment of the enterprise for six years; that defendants had forgotten the particulars of the transaction, and could find no papers relating to it except a rough copy of the modification; that their attorneys, from the scanty information they could give, believed that at the trial the real arrangement would have to be shown by parol; that the production by plaintiff at the trial of the writings was a surprise to them and their attorneys, and there was then no time to study and ascertain their precise bearing on the case, nor their relation to each other; and that even then defendants' attorney believed that parol testimony could be given to explain the papers, but that when the attempt to give it was made, it was excluded.

Held, on an appeal from an order granting the motion,

- (1) That the court had power to vacate the judgment and permit an amendment of the answer, the exercise of which power was in its discretion.

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- (2) That in view of the matters stated in the moving papers, and considering that in all probability the parties did not in fact intend the contract to be as the court, upon unexplained proof found it to be, whereby the real merits were not tried, and that possibly the judgment, unless vacated, might be relied on by the plaintiff as a bar to an action for reformation, and as a conclusive adjudication as to the true construction of the contract in all actions that might be brought from year to year during the life of the patent,—the discretion of the court below was properly exercised in vacating the judgment, and permitting an amendment of the answer.
- (3) That the terms imposed, viz: the payment of the costs of the action, including the allowance, and of \$10 costs of motion, and, it appearing that defendants had brought an action for reformation of the contract, in which a demurrer had been interposed, that such action be discontinued, and the costs thereof (to be taxed as if the demurrer had been sustained), be paid,—were proper, with the modification that the amendment should be restricted to setting up only the defense relating to the right of defendants to have the contract that was written reformed, so as to express the actual intention of the parties as to what it should contain, so as to prevent a re-trial of the old issues; and that, as thus modified, the order should be affirmed.

Before SEDGWICK, Ch. J., and TRUAX, J.

Decided June 1, 1885.

Appeal by plaintiff from order granting defendants' motion that the judgment be opened and defendants allowed to amend their answer and have a new trial on the issues so to be formed.

The motion was made at special term, where the following opinion was delivered, March 11, 1885, the action therein referred to as the first entitled action, being the present action; and that referred as the second action, being one brought by the defendants here, against the plaintiff for reformation of the contracts in question:—

“FREEDMAN, J.—Upon affidavits and all the papers and proceedings in the first entitled action, and the summons and complaint and certain affidavits entitled in the second action, and upon a case settled and printed in the first entitled action, Henry and Martin Schrenkeisen now move at special term: 1. That the judgment in the first

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entitled action, though affirmed by the general term, be vacated and set aside, and that the case be referred back to the special term for re-trial; 2. That all proceedings on the part of Peter Born in the first entitled action be stayed until after the trial of the second action; and, 3. That they have such other and further relief as may be just and equitable.

“At the same time, Peter Born, besides opposing the motions by counter-affidavits, demurs to the complaint in the second action upon the ground that it appears upon the face of the complaint, 1. That there is another action pending between the same parties for the same cause; and, 2. That the complaint does not state facts sufficient to constitute a cause of action.

“The most material facts, briefly stated, are as follows: In 1876, Peter Born obtained a patent for an improvement in folding chairs, and thereafter Henry and Martin Schrenkeisen agreed with him to take an assignment of his patent, to try to introduce the chair, to pay him a royalty of 75 cents on each chair made and sold, to give him a license to make and sell the chair at his own store in the city of New York, and to refrain on their part from selling in the city of New York or the city of Brooklyn so long as he made use of the license. This agreement was perfectly expressed in the assignment. The license, with two papers, were carefully prepared under the direction of Henry and Martin Schrenkeisen. When, however, the parties came together to execute the papers, Born wanted something different, namely a royalty on 600 chairs a year, irrespective of the number actually manufactured and sold, in addition to the \$1,200 agreed upon for the assignment of the patent. According to the claim of Martin and Henry Schrenkeisen, it was then said in their behalf, that, if they in the course of their extensive business as manufacturers of furniture could not sell 600 of the chairs in a year, they preferred to sell none at all, and that consequently they would agree to the proposed modification, if Born would agree

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that if they should not be able to sell that number a year, the whole arrangement between them should be null and void. These were not the precise words, but the substance of what was said, and Henry and Martin Schrenkeisen claim, though Born denies it, that the latter agreed to that. It is beyond controversy, however, that some modification was then and there agreed upon, and that, whatever it was, Martin Schrenkeisen undertook to make a memorandum of it, and that he did so on the spot, and without legal advice. The modification should have been inserted as a proviso in the assignment, but Martin Schrenkeisen, who is a German, and not thoroughly master of the idioms of the English language, put it upon the back of Born's license and in the following words, viz.: 'We agree to number the chairs in rotation, pay royalty every month if desired, and show our sales books for the number sold. We further agree to pay royalty on not less than 600 chairs a year, and should we fail in this the agreement shall be null and void. Signed by M. & H. SCHRENKEISEN, by M. SCHRENKEISEN.'

"After this, as further claimed by the Schrenkeisens, a considerable sum of money was spent by them in the effort to successfully introduce the chair, but the chair did not work well in use, and would not sell. They could only sell 209 chairs, and they paid to Born for royalties for the same \$88.50 in February, 1877, and \$86.25 on January 8, 1878. Born was then told that that was the end of the matter; that the invention was a failure, and that it was useless to proceed further. Born acquiesced, from that time until the year 1884 he made no further claim for royalties.

"The action first above entitled, was commenced in May, 1884. It was commenced to compel H. & M. Schrenkeisen to render an account to Born of the number of chairs manufactured and sold and to obtain a judgment for the amount due. The answer of H. & M. Schrenkeisen consisted of a general denial of the agreement, as set forth in the complaint, and a plea of failure of con-

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sideration. Upon the trial, all parol testimony which they sought to give to show the real character of the arrangement as claimed by them, was excluded, and it was held that the three writings, viz.: The assignment, the license and the memorandum on the back of the license, together constituted the contract between the parties, and that the contract, as thus appearing, was so clear that no parol evidence could be admitted to vary or modify it. It was further held that the words 'null and void' in the memorandum, should be construed to mean 'voidable at the option of Born,' and under this construction the trial finally resulted in a judgment in favor of Born for \$4,401.92. From that judgment H. & M. Schrenkeisen appealed to the general term, where the judgment was affirmed. Thereupon they brought the second action above referred to, for the purpose of obtaining a reformation of the contract so that it should express the true intent and meaning of the parties, which, as claimed by them, were as above stated. To the complaint in this action, Born demurred upon the grounds stated.

"Upon an examination of that complaint, which contains a great deal more than I have so far stated, I arrived at the conclusion that, upon its face, it does set forth a sufficient cause of action for a reformation of the contract, so far as the objections specifically urged against it are concerned, and that the objection of the pendency of another action for the same cause, is not tenable because the causes of actions are not the same. If, therefore, I were to pass upon the sufficiency of the demurrer alone, H. & M. Schrenkeisen should have judgment upon the demurrer, with leave to Born to answer.

"But the action, to the complaint of which the said demurrer was interposed, is itself only one of several measures adopted by H. & M. Schrenkeisen to obtain the same end, namely, relief against the alleged unjust judgment in the first entitled action, and this makes it necessary that the relations between the two actions should be

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still further and more accurately determined. When that is attempted, it appears at once that, although the complaint in the second action is not demurrable upon either of the grounds specifically assigned, H. & M. Schrenkeisen may in the end be defeated in the action brought by them by proof that the contract sought to be reformed was the subject of a former adjudication, by which a certain construction was conclusively established. In other words, the former adjudication as to what the contract was, standing unreversed and unvacated, may be invoked as a bar to a reformation.

“Under these circumstances, it becomes apparent that, whatever relief can be extended to H. & M. Schrenkeisen, must be granted in the first entitled action. As to the power of the court to vacate the judgment and grant a new trial as a matter of favor and upon terms, there can be no doubt, since the decision of the court of appeals in *Hatch v. Central National Bank* (78 N. Y. 487). In that case an order was sustained which, after the payment and satisfaction of the judgment in favor of the plaintiff, vacated the judgment and allowed an amendment of the complaint by the addition of new causes of action, which otherwise would have been barred by the statute of limitation. It is a power inherent in the court and not limited in matters of substance by the provisions of the Code of Civil Procedure. Moreover, section 724 of said Code is, of itself, quite sufficient for the purposes of the present case. The question, therefore, remains whether, upon all the facts presented, a case has been made out which calls for the exercise of the power.

“In the determination of that question it must be assumed that the issues raised by the pleadings in the first action, so far as they went, were correctly disposed of. It must also be borne in mind that ordinarily a defendant will not be permitted to experiment with his defenses. As a general rule, he must be held to his election. Change of counsel and the substitution of a new theory, are never of themselves sufficient.

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“ But H. & M. Schrenkeisen have shown, in addition to what has already been pointed out, that, when this action was commenced in May, 1884, no papers relating to it could be found, except a rough copy of the memorandum which had been indorsed on the license ; that they did not, at the time, remember the other papers ; that owing to the lapse of time and Born’s acquiescence in the abandonment of the enterprise for about six years, they had forgotten the particulars of the original transaction ; that from the scanty information they were able to give to their attorneys, the said attorneys believed that at the trial the real arrangement would have to be established by parol testimony ; that the production, by Born’s counsel, of the assignment, the license and the memorandum was a surprise to them and to their attorneys ; that then there was no time left to study and ascertain the precise bearing of these three papers upon the case, nor the relation of the papers to each other ; and that even then their attorneys remained under the impression that parol testimony could be given to explain the papers, but that, when the attempt was made to give it, all parol testimony was excluded.

“ Upon the whole case, I think it may be fairly held that, even if it could be said that H. & M. Schrenkeisen had no business to be surprised as stated, they still have made out a case of excusable neglect ; and when to this is added the consideration that in all probability the parties did not in fact intend the contract to be as the court, upon unexplained proof, found it was, and that consequently the real merits were not tried, and that the judgment, unless vacated, would be a conclusive adjudication as to the true construction of the contract in all actions which may be brought from year to year during the life of the patent, a case is presented which calls for the exercise of the equitable powers of the court.

“ In conclusion, acknowledgment should be made that Born denies many of the statements contained in the moving papers, and especially the principal statements relied

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upon for a reformation of the contract, though he concedes that the memorandum is in the handwriting of Martin Schrenkeisen, and that it was made by the latter without legal assistance, and at the time and place as stated by the latter. But in my judgment Born's denials are not sufficient to overcome the case of excusable neglect as made out by H. & M. Schrenkeisen, resting, as that does, largely upon his own inaction and acquiescence for six years ; and his denials of the matters relied upon as ground for reformation, create an issue which ought not to be determined upon affidavits. As the case stands, there is a probability at least that H. & M. Schrenkeisen may succeed in establishing their version of the contract, and as the contract, when once fully determined, will govern in future litigations, they ought to have an opportunity to fairly litigate the question. I, for one, cannot believe, upon what now appears, that the parties, in point of fact, intended that Born only should have the option to declare the contract null and void. What H. & M. Schrenkeisen intended to provide against, was a failure of the enterprise, notwithstanding their most faithful efforts to insure success. In that event, they wanted to have the privilege of saying that they would go no farther. But under the construction adopted by this court, under the circumstances hereinbefore stated, Born only was to have that privilege, although, in case of a failure of the enterprise, notwithstanding the best endeavors of H. & M. Schrenkeisen, his interest would prevent him from ever claiming the privilege.

"My final conclusion is, that the judgment in the first entitled action should be vacated and set aside, and a new trial granted, and that H. & M. Schrenkeisen should have leave to amend their answer in said action, as they may be advised ; but that this relief should be granted only upon the following conditions, viz. : 1. That they pay the costs of said action as taxed, inclusive of the allowance contained in said costs ; 2. That they discontinue the action brought by them for a reformation, and pay the costs

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thereof to be taxed as if the demurrer to the complaint had been sustained; and, 3. That they pay ten dollars costs of motion."

Wehle & Jordan, attorneys, and *Henry Wehle*, of counsel for appellant, on the questions considered in the opinion, argued:—I. The court had no jurisdiction to make the order appealed from. The Code authorizes the court to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect (*Code*, § 724). That this power is not unlimited, and that the court cannot grant orders in the exercise of this power which are prohibited by other provisions of law, has been well established (*McFarren v. St. John*, 14 *Hun*, 387; *Riggs v. Waydell*, 17 *Ib.* 515; *Werboloski v. Greenwich Ins. Co.*, 14 *Abb. N. C.* 96). From the very nature of this provision it follows that it can only be invoked in a case where no other relief has been invoked. The defendants could not, after having taken their appeal, after seeking the remedial power of the appellate tribunal, return to the special term and ask its interference (*Fischer v. Corwin*, 21 *Week. Dig.* 7). The case of *Hatch v. Central National Bank* (78 *N. Y.* 481), cited by the court below, is not in point. The judgment which was vacated in that case had not been appealed from. In *Hubbard v. Copcutt* (9 *Abb. N. S.* 290), the special term modified a judgment, after it had been affirmed at general term, by deducting an item from the recovery. The court of appeals held that the special term had no jurisdiction so to interfere with the judgment, although the appeal was dismissed on another ground. In *McKelvey v. Lewis* (44 *Super. Ct.* 561), which is cited by defendants' counsel, the special term merely amended the judgment at the application of the successful respondent, so that the original adjudication could be executed completely, and this order was properly affirmed at general term. But of course this decision could not sanction the setting aside, the overriding, of a judgment of the general term.

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II. If the application had been made to the proper tribunal, it should have been denied. (a) Because the defendants had been guilty of gross laches. (b) The ground of their motion, as contained in their moving papers, amounts to this, that they were mistaken about the law. (c) If the order appealed from can stand, almost every judgment rendered at the special term, and every verdict recovered at the trial term could be set aside on similar grounds (*Price v. Price*, 33 *Hun*, 432).

III. The application should have been denied also on the ground that, to grant it, would be a premium upon reckless swearing.

IV. The application should have been denied on the ground of defendants' gross negligence. Defendants should be taught that, after interposing an answer, amending it under the rules of the court, and amending it again by the favor of the court on the trial, and inviting the decision of the court upon that answer, and after seeing the judgment of the court and the grounds thereof, he will not be permitted to tempt fortune on another answer, when it plainly appears that by any reasonable care and circumspection he would have discovered the grounds upon which he now claims that that new answer could be interposed. The case of *Price v. Price* (*supra*), was a case much more meritorious than the defendants' case. If the defendants had answered truthfully the complaint, they would have been bound to admit each and every fact set out in the complaint, and then they might have pleaded whatever claim he might have made upon a reformation of the contract. At that time, however, the defendants acted upon advice which held that plaintiff cannot recover on the contract as written. Under such advice, a reformation of the contract was not necessary. Defendants relied upon that advice ; but now, after seeing the judgment of the court, they have become wiser ; they retained other counsel, who gave different advice. It is not to be wondered at that defendants seek an opportunity to try the case again in order to profit

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from the new light that has come to them. Every suitor who lost a cause has undoubtedly the same desire. But the policy of the law is immutably opposed to it.

V. The motion should have been denied on the further ground that the affidavits of both parties in respect to the contract do not show a cause for reforming the contract. Upon a motion of this character, the courts ought to exact at least a fair preponderance of evidence on the question as to whether the defendant is entitled to demand a reformation of the contract. And if the tests which have been established upon motions for a new trial on the grounds of newly discovered evidence, are to be applied to a motion of this character, then the motion must have failed, because there is no such preponderance in favor of defendants' claim (*People v. Super. Ct.*, 10 *Wend.* 285; *Peck v. Hiler*, 30 *Barb.* 655; *Sheldon v. Stryker*, 27 *How.* 387).

VI. The motion should have been denied, even if the court had concluded that the agreement was made as claimed by defendants.

VII. The terms upon which this judgment was set aside, assuming that the court below had jurisdiction to vacate it upon any terms, were inadequate. The defendants should have been required to pay at least all the royalties which were earned up to the date of the order. As the defendants cannot have the patent and withhold the royalties, they should be compelled to pay royalties up to the time of returning the patent (*Marston v. Swett*, 66 *N. Y.* 207; *Hilton v. Libby*, 44 *Super. Ct.* 12).

Porter & Kilvert, attorneys, and *W. W. MacFarland*, of counsel for respondents, on the questions considered in the opinion, argued:—I. The court had power to make the order vacating the judgment. This proposition is too well settled to admit of discussion; nor does the learned opinion at special term leave anything further to be said on this point (*Hatch v. Cent. Nat. Bank*, 78 *N. Y.* 487; *Code*, § 724). In England, the courts have always exer-

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cised this power as part of their inherent authority (*Canon v. Reynolds*, 5 *El. & Bl.* 301; *Delafield v. Tanner*, 1 *Marsh.* 391; 5 *Taunt.* 856; *Evans v. Gill*, 1 *B. & P.* 52; *Waters v. Waters*, 2 *De Gex & S.* 591; *Lancaster Bk'g Co. v. Cooper*, 9 *Ch. D.* 594).

II. It was a proper exercise of discretion. The merits of the case had not been fairly investigated, nor at all (*Waters v. Waters*, 2 *De Gex & S.* 591). The miscarriage of the case on defendants' part, was due to the antiquity of an affair begun, ended and forgotten years before, and the loss of the papers relating to it, and all memory of details; hence the attorneys were not and could not be properly instructed. The answer failed to present the defense. The judge obtained no accurate knowledge of the case. The result was, that the case was not properly developed, presented or tried, though without its being possible to say with justice, that any particular fault attached to any one. It was simply one of those miscarriages that will sometimes happen, and when they do, ought to be put right.

III. That the real intention of the parties was as defendants claim, admits of no doubt, and is, indeed, made quite conclusive by the following considerations: 1. In the first place it is incredible that men of long and extensive business experience like the defendants, should agree, off-hand, and unconditionally, to pay the plaintiff an annuity of \$450 a year, for the whole life of such a patent, just issued, untried and without any knowledge as to its validity or value. 2. The proofs now presented make it entirely clear that the plaintiff himself never so understood the arrangement. He made a final settlement in respect of royalty in January, 1878, being then told that as the chair was a failure the defendants would make no more. He received what was due to him at the rate of 75 cents for each chair made and sold, and was content, and remained so for over six years after that payment, and would never have dreamed of any other construction if some attorney had not put the idea into his head.

Opinion PER CURIAM.

IV. The motion papers present a case entirely free from negligence or any fault on the part of the defendants or their attorneys, if fair allowance be made for the difficulties under which they labored in the preparation and trial of the case.

PER CURIAM.—The opinion of the learned judge below, shows that justice required that the defendants should have the relief that was granted by the order appealed from. It is best, however, that certain modifications be made, which will obviate certain consequences, generally relied upon as the ground of denying applications for new trials. The order should be modified so as to prevent a re-trial of the old issues. This will be accomplished by permitting the defendants to amend the old answer by setting up in the amended answer only the defense which was made the ground of the application below. This defense relates to the right of the defendant to have the contract that was written reformed, so as to express the actual intention of the parties, as to what it should contain. The leave to amend should be as exact as possible as to the contemplated amendment, and the time within which it is to be served should be specified. The order will be settled upon notice.

The order below, modified as suggested, is affirmed, without costs to either party.

Opinion of INGRAHAM, J.

WILLIAM H. MACPHERSON, APPELLANT, v. THE
WESTERN UNION TELEGRAPH CO., RESPONDENT.

Telegraph company—liability for failure to transmit.—Pleading.

A telegraph company is not a common carrier.

A condition precedent to its duty to transmit a message (there being no contract), is payment of the usual charges.

A complaint against a telegraph company for damages for failure to deliver a message, is insufficient on demurrer, when it neither alleges payment of the usual charges, nor tender thereof, nor any fact showing a waiver thereof, nor any contract between the parties.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 1, 1885.

Appeal by plaintiff, from judgment dismissing the complaint, entered upon the complaint and the demurrer to it.

Action for damages for failure to deliver a telegraphic message given to defendant for transmission.

Plaintiff's counsel laid much stress on the following allegation in the complaint: "V.—That, as this plaintiff is informed and believes, the defendant did dispatch said message as aforesaid over its wires, from its office in Troy to its office in the city of New York, but on the arrival of the message in the office of defendant in the city of New York, defendant negligently failed to deliver the message as aforesaid to the plaintiff herein, the successor of the firm of Cerruti & Macpherson or to the aforesaid Pietro Cerruti."

The following opinion was delivered at special term:

INGRAHAM, J.—"The breach of duty by the defendant, on which this action is founded, is the failure to deliver to plaintiff a telegram addressed to a firm, of which plaintiff was a member, and of which he is the successor in business.

"Conceding that the defendant is subject to the obligations of a common carrier, in order to sustain the action,

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the complaint must allege facts which made it the duty of the defendant to receive and transmit the despatch.

“Section 11 of chapter 265 of the laws 1848, makes it the duty of a telegraph company doing business within this state, to receive despatches, and on payment of its usual charge for the transmitting despatches, as established by the rules and regulations of such telegraph company, to transmit the same with impartiality and good faith. The duty to transmit the despatch is on payment of its usual charges; until such payment, or tender of payment, the telegraph company is under no duty to transmit the despatch, and as there was no contract between the parties the defendant is not liable, except for a breach of some duty.

“The complaint does not allege that the usual charge for transmitting the message was paid or tendered to the defendant, nor does it allege any fact to show a waiver of such payment by the defendant.

“The general term of the supreme court has held that a telegraph company is not a common carrier, and is not subject to the peculiar liability of a common carrier (*Schwartz v. Atlantic & P. Telegraph Co.*, 18 *Hun*, 157).

“It does not appear from the complaint that defendant was under any duty to plaintiff to transmit the despatch, and its failure to deliver it imposed no liability.”

“The demurrer must be sustained, and judgment ordered for defendant thereon with costs, with leave to plaintiff to amend the complaint within twenty days on payment of costs.”

Frank Keck, attorney, and of counsel, and *R. V. W. Dubois*, of counsel for appellant, as bearing on the point on which the demurrer was decided, argued:—I. Section 11, chapter 265, of the laws 1848, upon which the opinion sustaining the demurrer is based, is as follows:

“It shall be the duty of the owner or the association owning any telegraph line doing business within the state

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to receive despatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual fixed charges for individuals for transmitting despatches as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under the penalty of one hundred dollars for every neglect or refusal so to do, to be recovered, with costs of suit, in the name and for the benefit of the person or persons sending or desiring to send such despatch." The statute only refers to the right of the individual who has suffered through the neglect of the company to deliver his message, after payment of their fixed rates or charges, to recover the penalty prescribed by the statute, and does not refer to or restrict the right of such individual to bring suit for any pecuniary damage he may have suffered by reason of such neglect to deliver his message, where the usual charges have or have not been paid. This action is not brought under the section referred to, to recover the penalty thereunder, and not on contract, but is an action sounding in tort.

II. The plaintiff and defendant, as between themselves, entered into no contract, but the defendant undertook, at the request of Sherman & McDonough, to transmit the message from Troy to the plaintiff in this city, and having executed the undertaking so far as to transmit the message over their wires to their office in this city, were in duty bound to deliver the same (*Baldwin v. U. S. Tel. Co.*, 6 *Abb. Pr. N. S.* 426 ; *Bryant v. Am. Tel. Co.*, 1 *Daly*, 575).

III. The message having been correctly transmitted and the same correctly transcribed, the mere manual delivery of the message remaining, the common carrier liability has arisen, and the rule analogous to that giving a consignee a right of action against a common carrier for goods lost *in transitu* applies (*DeRutte v. L. Valley & Buffalo Tel. Co.*, 1 *Daly*, 547 ; *S. C.*, 30 *How.* 403).

IV. The common carrier liability being established as between the defendant and plaintiff, respecting the mes-

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sage, the defendant was bound to make due effort and use due diligence to find the address in order to make personal delivery of the message transmitted, and in failing to do so and the message being lost while in its hands, it is responsible (*Western Union Tel. Co. v. Fenton*, 52 *Ind.* 1; *Whitbeck v. Holland*, 45 *N. Y.* 13; *aff'g* 55 *Barb.* 443; *West. Union Tel. Co. v. Lindley*, 62 *Ind.* 371; *Hibbard v. West. Union Tel. Co.*, 33 *Wis.* 358; 14 *Bradw. [Ill.]* 531).

Dillon & Swayne, attorneys, and *Melville Eggleston*, of counsel for respondent, on the point on which the demurrer was decided, argued:—I. There was no contract with plaintiff, nor even one made for his benefit. There was no privity between him and defendant. The settled doctrine of English courts is that the receiver cannot maintain an action unless the sender, in filing the message, acted as his agent (*Playford v. United Kingdom Telegraph Co.*, *L. R.* 4 *Q. B.* 706). Nothing of the kind is alleged. The rule is the same in this country so far as any obligation of contract is concerned. The plaintiff can therefore sue, if at all, only upon the ground of tort, even if he be considered as standing in the place of the receiver or addressee of a message (*Tel. Co. v. Dryburgh*, 35 *Pa. St.* 303; *Rose v. U. S. Tel. Co.*, 3 *Abb. Pr. N. S.* 459; 2 *Thompson on Negl.* 847).

II. The wrong complained of is a non-feasance. But the obligations of a telegraph company as to sending and delivering messages are defined by law, and are dependent upon compliance with its reasonable rules and regulations and the payment of the usual compensation, as to all of which nothing is alleged in the complaint. (a) The defendant is not a common carrier (*Breese v. U. S. Tel. Co.*, 48 *N. Y.* 132; *Schwartz v. A. & P. Tel. Co.*, 18 *Hun*, 158). (b) Its whole duty is defined by the laws of this state relating to telegraph companies (*Breese v. U. S. Tel. Co.*, *supra*; *Childs v. Smith*, 55 *Barb.* 45). The statute requires telegraph companies to receive and transmit despatches

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only "on payment of their usual charges" (3 R. S. [Edm. 2d ed.] 722). It was upon the ground that the complaint failed to show that the usual charges had been paid in this case, that the demurrer was sustained at the special term.

PER CURIAM.—Judgment affirmed upon the opinion delivered at special term, with costs.

MORRIS J. RITTERMAN, RESPONDENT, v. ELIHU H. ROPES, APPELLANT.

Negligence case—Execution against the person.

An execution against the body can issue against defendant upon a judgment obtained against him, in an action for personal injuries caused by his negligence, though no order of arrest has been obtained.

Before SEDGWICK, Ch. J. and FREEDMAN, J.

Decided June 1, 1885.

Appeal from order denying defendant's motion to set aside an execution against his person.

Action for damages for personal injuries, viz.: the loss of an eye, caused by defendant's negligence. Plaintiff obtained a verdict for \$8,000, which was confirmed by the general term (51 Super. Ct. 25), and, after return of execution against the property unsatisfied, issued an execution against defendant's person, no order of arrest having been obtained in the action.

The following opinion was delivered at special term:

TRUAX, J.—"Section 1487 of the Code of Civil Procedure authorizes the issuing of an execution against the person of the judgment debtor, when the plaintiff's right to arrest the defendant depends upon the nature of the action. One of the cases in which the right to arrest depends on the nature of the action, is where the action is brought to recover damages for a personal injury

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(§ 549). In this case, the person of the plaintiff was injured through the negligence of the defendant, who has been arrested on an execution against the person. This execution he moves to set aside, on the ground that the words personal injury, in section 549, as defined by section 3343, mean only libel, slander, criminal conversation, seduction, malicious prosecution, assault, battery, false imprisonment, or other actionable injury, of like nature, to the person of the plaintiff, or of another. That is, that the defendant can be arrested only when the injury is willful. This construction is opposed to the authorities (*Haines v. Joralemon*, 2 *Civ. Pro.* [McC.] 196; *Keeler v. Clark*, 18 *Abb. Pr.* 154; *Miller v. Scherder*, 2 *N. Y.* 262), and is not warranted by the Code, for section 553 of the Code of Civil Procedure provides that a woman cannot be arrested except . . . for a willful injury to person, character or property; in other words, a man may be arrested for any injury to the person of another, while a woman can only be arrested for a willful injury to the person of another.

“If the construction contended for by the defendant were the right one, section 553 would be unnecessary.

“The motion to vacate the order of arrest is denied, with costs.”

Root & Strong, attorneys, and *Theron H. Strong*, of counsel for appellant, argued:—I. The provisions of the Code relating to executions against the person, are not intended to and do not warrant the issue of an execution against the person in an action for negligence. By settled rules of statutory construction the words “other actionable injury” are limited and restrained by the words which precede them to other actionable injuries of the very same kind as those specified. (a) The actions specified all involve the elements of willful injury, one in which the intent of the author of the injury is prominent. None of them are cases of omission; all are cases of commission, in which the direct, positive and intentional act

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of a person produces injury to another. They are none of them cases of carelessness ; all are cases of willfulness. (b) There are many other instances not mentioned, of actionable injuries of the same nature as those specified, to which the term "other actionable injury" applies, such as nuisances by obstructing highways, placing a spring gun or trap on land over which others are licensed to pass, keeping mischievous animals, leasing property infected with contagious diseases, and other actions of a like nature. (c) It is to such cases that the words, "other actionable injury" apply. "Where general words follow particular words, the rule is to construe the former as to things or persons particularly mentioned" (*Sedgwick Statutory Constr.* 360 ; *Sandman v. Breach*, 7 B. & C. 96 ; *St. Louis v. Laughlin*, 49 Mo. 559 ; *State v. Pemberton*, 30 *Ib.* 376 ; *Maxwell's Interpretation Statutes*, 297 ; *Kitchen v. Shaw*, 6 A. & E. 729 ; *Williams v. Golden*, L. R. 1 C. & P. 69 ; *Rex v. Sanders*, 9 C. & P. 79 ; *Clark v. Gaskarth*, 8 Taunt. 431 ; *Hardcastle's Statutory Laws*, 83 ; *Ashbury Co. v. Riche*, L. R. 7 H. L. 653 ; *Potter's Dwarris Statutes*, 292 ; *Rex v. Manchester Co.*, 1 B. & C. 630 ; *Casher v. Holmes*, 2 B. & Ad. 592 ; *East London Water Works v. Mile End Town*, 17 Q. B. 512). In *Trustees Exempt Fireman's Fund v. Roome* (93 N. Y. 313), it was held that a case may be within the law and yet not within the intention of the legislature (Citing *People ex rel. Westchester Fire Ins. Co. v. Davenport*, 91 N. Y. 574 ; *People v. Fire Association of Phila.*, 92 *Ib.* 311).

II. It is confidently claimed that the words "other actionable injury," being general words following particular words, are restrained and limited by the latter, and the learned judge at special term plainly erred in supposing that this construction was opposed to the authorities, or rendered section 553, unnecessary. (a) The cases cited in the opinion are not authorities on this question (*Weber v. Black*, 18 Abb. Pr. 154 ; *Miller v. Scherer*, 2 N. Y. 262 ; *Haines v. Jerolomon*, 2 Civ. Pro.

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Rep. [McC.] 196), are to be distinguished. (b) Nor is section 553 rendered unnecessary. The learned justice supposed otherwise, because the word "willful," in connection with the words "injury to person," would be unnecessary. But this cannot be correct, for, if the section was abrogated, a woman might be arrested whenever a man could be. The section is necessary to limit a female's liability to arrest, and the present question of construction has nothing to do with the matter of necessity. The construction contended for, takes nothing away from section 553; it repeals nothing; it nullifies nothing. Section 3343 leaves section 553 to stand as before, but applies the same rule to men respecting personal injuries which applied to women. The most that could be claimed would be that the word "willful" might, upon the rule of construction contended for, be unnecessary in connection with the words "injury to person," but it is plainly necessary in connection with the words "character or property," and this would hardly be a reason for remodelling the entire section. But section 549 was enacted long before section 3343, and was really a re-enactment of section 179 of the old Code, passed before any limitation or definition of the term "personal injury." So far, however, from defeating the construction claimed, it aids it—the definition of the term "personal injury" manifesting a disposition to harmonize and unify the grounds of arrest respecting both sexes.

III. The construction contended for is also supported by legislative intent, as manifested, and by the course of judicial decision. The provision in the old Code was much broader even than in the present Code, the expression there being "or where the action is for an injury to person or character" (§ 179), thus including all possible injuries either of omission or commission where character or person was involved (*Code Pro.* § 179; see § 228 as to executions against the person). And yet Judge FREEDMAN questioned its applicability to *all* forms of action, and denied its application to a case of death through negli-

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gence, although such a case was really within the letter of the law (*Ryall v. Kennedy*, 41 *Super. Ct.* 531). The present Code is by no means so broad, omitting the words, "injury to character," and restricting somewhat the words injury to person, and defining their limitation (§ 549, as explained by § 3343). But it can never be that the legislature could intend such a rule, if adopted, to be other than of general application, and yet how impossible of general application it would be if it prevailed. In cases against the mayor, aldermen, &c., against whom would the execution run? In cases against railroad corporations, express companies, steamship lines, building corporations, are they all to be exempt because the rule does not admit of practical application, and yet enforce it as against mere private owners of real property or common conveyances? No rule so discriminating or unjust could be within the legislative intent. The course of decision is also in favor of the construction contended for (*Parker v. Spear*, 49 *Sup. Ct.* 2; 62 *How. Pr.* 394; *Ryall v. Kennedy*, 41 *Sup. Ct.* 531; *Davis v. Scott*, 15 *Abb.* 227; *Gibbs v. Larabee*, 23 *Wis.* 495; *Etna Ins. Co. v. Schuler*, 28 *Hun*, 338; *Catlin v. Adirondack Co.*, 81 *N. Y.* 639, reversing 20 *Hun*, 19).

Richard S. Newcombe, attorney, and *Albert Cardozo*, of counsel for respondent, argued:—I. Section 1487 authorizes execution against the person: 1. Where the right to arrest the defendant depends on the nature of the action. Section 549 provides for arrest in actions: Subd. 2. "To recover damages for a personal injury." And by section 3343, subd. 9, it is declared that "a personal injury" includes libel, slander, criminal conversation, seduction, malicious prosecution, also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff or of another. The provision is as broad as it can be; it specifies some, and in order to be full and general, it adds, "or other actionable injury to the person," etc. That the cause of complaint in this

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case was an actionable "injury to the person," admits of no doubt.

II. That an execution may be issued against the body in an action based on negligence was decided in *Catlin v. Adirondack Co.* (20 *Hun*, 19). See *Parker v. Spear* (62 *How. Pr.* 394); *Ætna Ins. Co. v. Shuler* (28 *Ib.* 340).

III. The case of *Ryall v. Kennedy* (41 *Super. Ct.* 531), relied on by the defendant, decided only that an action brought by an administrator for the killing of the intestate was not an action for personal injuries. But *Ryall v. Kennedy* has no relevancy to the present question. It was decided in 1877, and was based upon sections 288, 179, 181 of the Code as then existing.

IV. This construction is maintained by a comparison of the sections of the Code. Section 553 provides that a woman cannot be arrested except for willful injury ; but there is no such restriction as respects a man.

PER CURIAM.—The order should be affirmed with costs upon the opinion of the learned judge at special term.

ISAAC E. WRIGHT, APPELLANT, v. HERMAN MISCHO,
RESPONDENT.

Purchase of land—binding contract to purchase—delivery of memorandum sufficient to satisfy statute of frauds, and payment of a sum of money not necessarily sufficient.

After some negotiation as to the purchase and sale of certain specified property owned by the plaintiff, the following took place at defendant's store, as testified to by plaintiff: Defendant said he would give for the property \$24,000, and \$500 in furs. Plaintiff said, "It is yours, I will draw you a contract, a receipt, and you pay me some money." Defendant said, "Very well, I have not much money in the safe." Plaintiff said, "\$50 will do." Defendant instructed his book-keeper to give plaintiff \$50, and "to draw a receipt." The book-keeper said to plaintiff "You had better draw the receipt yourself." Plaintiff then drew the receipt. The document drawn constituted a sufficient memorandum of

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sale under the statute of frauds, was signed by plaintiff, who received the \$50, and left the document with the defendant. It was understood at the interview that plaintiff was to have a formal contract drawn the next day, and defendant was to call at his office and pay \$950 additional. The next day, as also testified to by plaintiff, defendant called at plaintiff's office, and the formal contract (which had been prepared in duplicate) was read over to him, he said "they are apparently all correct, I do not see anything there but what I agree to, . . . but I never sign any papers without my attorney seeing them.' I said 'I want this money to-day.' He said, 'You sign this contract and leave it here with Mr. Knapp, and if my attorney does not come from Brooklyn, I will show it to another attorney and be here in time for banking hours with the check for \$950.' I then signed the contract and left it with my check as suggested." Defendant as a witness on his own behalf, and the only one, gave a materially different version of the two interviews.

Held, that the complaint was properly dismissed, and that the motion for a new trial which had been made on the minutes was properly denied.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 1, 1885.

Appeal by the plaintiff from a judgment dismissing his complaint, and from an order denying his motion for a new trial.

The cause was tried before O'GORMAN, J., and a jury. At the close of the testimony on both sides, the court, on motion of defendant's counsel, dismissed the complaint. The plaintiff then moved for a new trial on the minutes, which, after argument, was denied, O'GORMAN, J., writing as follows:

"The action is brought for the recovery of \$4,000 as damages resulting from the breach, by the defendant, of a contract alleged to have been made by him in March, 1883, to purchase from the plaintiff certain real property in this city.

"The burden of proving this contract, by a preponderance of evidence, was on the plaintiff. The plaintiff testified, that after some preliminary negotiation between him and the defendant, an interview took place on or about March 21, 1883, at the store of defendant, who deals in furs. Defendant said he would give plaintiff for the

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property \$24,000, and \$500 in furs, to which plaintiff answered, 'The property is yours.' Defendant said, 'I want to know that for sure, because if I don't get this property, I want other property I am looking at.' Plaintiff said, 'It is yours. I will draw you a contract, a receipt, and you pay me some money.' He (defendant) says, 'Very well, I have not much money in the safe.' I said, 'all right, \$50 will do.' Defendant then instructed his book-keeper to give me (plaintiff) fifty dollars, and to draw a receipt. The book-keeper commenced drawing the receipt, and turned to me (plaintiff) and said, 'Mr. Wright, you know more about this property than I do; you know the location of it; you better draw the receipt yourself;' then I took the pen and drew a receipt; This document was thereupon signed by the plaintiff, and left with the defendant, and plaintiff received the fifty dollars in bills. It was not produced at the trial by the defendant, who stated that it was lost, and plaintiff testified as to its contents, using, to refresh his memory, a copy which he made of the document a few days after it had been signed by him. The following is a copy: 'NEW YORK, March 21, 1883. Received from Herman Mischo, the sum of \$50 on account of purchase of property, known as 411 and 413 East 115th street, for the sum of \$24,500, as follows: subject to \$16,000, now a lien on said property, \$8,000 in cash, and \$500 in furs. The property to be free and clear of all incumbrances except as above mentioned. Deed to be given on April 2, 1883.' This paper, as the plaintiff testified, was read over to the defendant. This, however, defendant denies. Plaintiff, continuing his testimony further, said: 'I was to have a contract drawn next morning, and Mr. Mischo was to call at my office and pay \$950 additional. I read the contract over to him.' He says, 'Mr. Wright, they are apparently all correct, I do not see anything there but what I agree to, but I have always done business in such a way that I never sign any papers without my attorney seeing them.' I said to him, 'I want the money to-day.' He said, 'You sign this contract and

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leave it here with Mr. Knapp (plaintiff's clerk), and before three o'clock, if my attorney does not come from Brooklyn, I will show it to another attorney, and be here in time for banking hours with the check for \$950.' The contract was thereupon signed by plaintiff and left with the clerk. Defendant did not return that day, and wrote a letter to plaintiff, declining to proceed further in the transaction. This letter was answered on the part of the plaintiff, stating that defendant had bought the property and had plaintiff's receipt, which debarred plaintiff from selling it to any one else, whereupon defendant again wrote to plaintiff, inclosing plaintiff's signature, which had been cut from the receipt. Plaintiff thereupon took steps to sell the property by private sale, and, failing in that, sold it at auction on May 12, 1883, for \$20,500, \$4,000 less than the price at which he claims that it was purchased from him by defendant. Plaintiff testified that the market value of the property in April, 1883, was about \$20,500 or \$21,000.

"These are, I think, the material facts, as testified to by the plaintiff.

"The question to be considered, is whether or no the transaction, as thus described by him, constituted a contract by the defendant to purchase the property and take a deed for it and pay for it, according to the terms, as set forth in the receipt drawn up by the plaintiff and given by him to defendant. Did the delivery by plaintiff to the defendant of the receipt, and its acceptance by the defendant, coupled with the delivery by the defendant to the plaintiff of fifty dollars, as stated by the plaintiff, considered in the light of all the attendant circumstances, constitute, or supply sufficient evidence of a contract on the part of defendant to purchase the plaintiff's property, under the provisions of the statute of frauds as now in force in this state?

"The section of the act bearing on this subject is as follows: 'Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any

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interest in lands, shall be void, unless the contract or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made.'

"This receipt sets forth, I think, with sufficient accuracy, the description of the property, the price, and the terms of sale, to constitute 'a note or memorandum of sale,' by the plaintiff under that section. But that is not the question here. The question is, did the whole transaction constitute a contract on the part of the defendant to buy? The section above set forth, does not require that the contract to *purchase* land should be in writing. But, nevertheless, a contract on the part of the *purchaser* is necessary to establish any obligation against him, and the burden is on the plaintiff to prove that such a contract was made.

"The plaintiff's claim here is, that the acceptance by the defendant of the *receipt*, drawn up by the plaintiff, and payment by the defendant of fifty dollars, constitute a contract on his part, or are evidence of a contract. From a *dictum* in the opinion of the court of appeals, in *Cagger v. Lansing* (43 N. Y. 550), it may be inferred, that the court held it to be law, that the delivery by the vendor to the purchaser of a written *contract for sale* of land, subscribed by the vendor alone, and its acceptance by the purchaser, would constitute a contract on the part of the latter to purchase, *if it were accepted by him as a valid subsisting contract*. But if not so accepted, that it would not be binding on him.

"Did defendant here accept this *receipt* as 'a valid subsisting contract' by the vendor to sell him this property? The burden of proving that he did so accept it, was on the plaintiff.

"The question can be answered only by considering the circumstances of the whole transaction in defendant's store, and also what occurred at the interview in plaintiff's office next day. The payment of money on account of a purchase of land is held not to be, of itself, evidence

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of a contract to purchase the land (*Cagger v. Lansing, supra*; *Baldwin v. Palmer*, 10 N. Y. 232).

"In *Raubitchek v. Blank* (80 N. Y. 478), an action was brought for payment of a check, valid on its face. The defendant pleaded want of consideration, and the burden of proof was on him. It appeared that the check was given as part payment, on a verbal agreement for the sale of land; that a receipt signed by the vendor was given to the purchaser, which receipt contained enough to constitute a note or memorandum under the statute of frauds. It was held, that the defendant failed to show that there was not good consideration for the check; that the receipt amounted to a contract of sale, sufficient to satisfy the statute of frauds, and was binding on the vendor; that the transaction bound the purchaser also, on the ground that the receipt and the check formed one contract, the mutual relations of these several writings appearing on their face. This case has been referred to in the argument, but is not in point with the case at bar, for the burden of proof there was on the defendant to prove that no valid contract existed on the part of the vendor to sell the property, whereas, in the case at bar, the burden is on the plaintiff to prove that there was a valid contract on the part of the defendant to buy; and it is worthy of note that only three members of the court of appeals concurred in the decision in that case.

"The question then in the case at bar, is whether there was evidence enough to go to the jury, that defendant understood the receipt to be, or that it was intended by plaintiff to be a valid and subsisting contract for the sale of the land, and that defendant accepted it as such. There is no evidence that he did so. At the interview in his store, defendant directed his book-keeper to draw a receipt. The book-keeper requested plaintiff to draw the receipt himself. The document was in form a receipt, and in the interview and conversation between plaintiff and defendant it was called a receipt.

"The agreement then made between plaintiff and

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defendant, that they were to execute a contract in counterpart the morning after that interview, does not favor the conclusion that defendant understood that a valid and subsisting contract, binding plaintiff, had been made, or was intended to be made by plaintiff, and that the defendant was bound, as a purchaser, by reason of the delivery to, and acceptance by him of a contract. If defendant believed, and had reason to believe, that the paper then signed by plaintiff, and delivered to him, was a receipt, and nothing more, there was no valid or binding contract between them. A strong preponderance of evidence is that he did so believe.

"I have considered this question, so far, by the light only of the evidence in its aspect most favorable to the plaintiff, and I find therein no proofs of any valid contract on the part of the defendant to purchase this property.

"At the trial of the action, all evidence on both sides was received that was believed to be material and relevant to a full understanding of the whole transaction; and taking the evidence in the case altogether, I think that there is not only a failure of necessary proof by the plaintiff, but a preponderance of evidence in favor of the defendant. His conduct may have been unbusinesslike, vacillating, and on various grounds open to serious objection, but I see no evidence in the case that would have warranted a jury in finding that he had violated a contract by reason of which plaintiff was entitled to claim damages against him.

"The motion for a new trial is denied, but without costs."

E. H. Moeran, and *Alfred Pagelow*, for appellant, argued:—I. The receipt embracing the memorandum of the contract signed by the vendor, and delivered to and accepted by the vendee, constituted a contract for the sale and purchase of real estate, valid within the statute of frauds, and binding on both (*Tallman v. Franklin*, 14 N.

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Y. 585 ; *Champlin v. Parrish*, 11 *Paige*, 409 ; *Cales v. Bowne*, 10 *Paige*, 537 ; *Bleecker v. Franklin*, 2 *E. D. S.* 93 ; *The National Fire Ins. Co. v. Loomis*, 11 *Paige*, 433). *Bicknell v. Byrnes* (23 *How.* 486), holds, that in sales of mortgaged premises under a decree, it is not essential to the validity of a sale that the purchaser sign the memorandum of the sale. It is enough if signed by the officer making it.

The opinion in *Müller v. Maxwell* (2 *Bosw.* 359), by SLOSSON, J., contains a reference to the case of *Bleecker v. Franklin* (*supra*), and affirms its doctrine. The opinion of DANIELS, J., in *Burrell v. Root* (40 *N. Y.* 502), is clearly in point, and though a dissenting opinion, it is not in conflict with the prevailing opinion, for the reason that the contract in that case was sustained as a contract to purchase, and it was held binding as such, though there was no mutuality, on the ground that it was made for an implied consideration (being under seal). DANIELS, J., however, treats the matter as a contract to sell, and finds it not binding because not subscribed by the vendor. He holds the letter of the vendor, exercising the option he had, an insufficient memorandum, though signed by him and sent to and received by the vendee, for the reason that the referee found the above and that only, and did not find that it was received and *accepted* by him as the memorandum which would have been sufficient to hold him had such been the fact. See also *Raubitschek v. Blank* (80 *N. Y.* 493), which was an exchange of lands—and both parties were vendors with respect to their own lands—and therefore a signing by both parties was necessary, and on that ground only. See also *Justice v. Lang* (30 *How.* 439) ; *Caggar v. Lansing* (43 *N. Y.* 550).

II. The memorandum fully contained all the terms of the contract, and was sufficient in that respect under the statute (*Westervelt v. Matheson*, 1 *Hoff. Ch.* 37 ; *Cosack v. Descomdres*, 1 *McCord*, 425 ; *Hurley v. Brown*, 98 *Mass.* 545 ; 1 *Dart on Vendors & Purchasers*, 98 ; citing

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Blagden v. Breabear, 12 Ves. 466 ; Coles v. Precothick, 9 Ib. 234 ; Tallman v. Franklin, *supra*).

III. A final contract to sell and purchase, complete in all its parts, and evidenced as required by the statute of frauds, was fully established. And this, notwithstanding that "a more formal agreement was to be drawn and signed the next day." The English courts have many times considered the questions arising under this head, and the doctrine established by these adjudications is substantially that an acceptance of an offer to sell, the terms and property being sufficiently defined in the offer, and a memorandum sufficient to satisfy the statute of frauds being signed by the vendor, will constitute a final agreement to purchase, binding on the vendee ; although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or, although it may be an express term that a formal agreement shall be prepared and signed by the parties (*Fowle v. Freeman*, 9 Ves. 351 ; *Thomas v. Dering*, 1 Keene, 729 ; *Ridgeway v. Wharton*, 6 H. L. C. 264 ; *Chinnock v. Marchioness of Ely*, 4 De G. J. & S. 633 ; *Crossley v. Maycock*, L. R. 18 Eq. 181 ; *Rossiter v. Miller*, 3 L. R. App. Cases, 1124 ; Opinion of FRY, J., *Bonnewell v. Jenkins*, 8 L. R. Ch. Div. 70 ; *Brogden v. Metropolitan Railway*, 20 English Rep. 176 ; *Moak's Notes*, pp. 199 to 203 ; *Lewis v. Brass*, 28 Ib. 528 ; *Bonnewell v. Jenkins*, 25 Ib. 128 ; *Moak's Notes*, 131 ; *Byrne v. Van Tienhoven*, 30 Ib. 833 ; *Moak's Notes*, 839 ; *Bell v. Offert*, 10 Bush [Ky.] 632).

It is only in cases where the concluded nature of the agreement does not evidently appear on the writings, or cannot be fairly inferred therefrom, that the fact that a subsequent and more formal contract was intended to be entered into, will be strong evidence that the previous negotiations and writings were not intended to amount to a contract (*Ridgeway v. Wharton* ; *Chinnock v. Marchioness of Ely*, *supra*).

IV. The intention of the vendee to accept the memorandum as a binding contract, if material at all, was a

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question for the jury. The intention of a party is rarely, if ever, to be determined as a question of law. All the facts and circumstances of the case are to be given to the jury, and the fact is to be determined by them (*Lewis v. Brass, supra*).

Julius Klampke, attorney, and *Peter Mitchell*, of counsel for respondent, made the following points:—I. No contract was established which could bind the defendant. It is submitted, the essential elements which the law requires to constitute a contract are here wanting. There was no agreement or concurrence of the minds of the parties. Nor did the receipt, even if delivered to defendant, bind him as his contract. Its terms and conditions were not known to him; nor did he consider it in any other light than that of a mere receipt. And all through this controversy, and in his letter of March 23d to defendant, plaintiff characterizes and alludes to this paper as a receipt. There is nothing whatever in the defendant's conduct or actions to charge him with any knowledge of having entered into, or being bound by any contract. In fact, his whole conduct negatives such a presumption. The law is well settled that there can be no contract unless the parties thereto assent to the same thing in the same sense (*Ballard v. Trow's Printing, &c. Co., 7 Wash. L. R. 590*). Where there is any variance between the terms of the proposal and those of the acceptance, no contract arises (*Fry Spec. Perf.* 139, § 170). Again, if the plaintiff believed, or intended, that the receipt should constitute a contract, why trouble himself about the preparation and execution of another contract the next day?

II. The signing of the receipt by plaintiff is not a sufficient compliance with the statute of frauds. The receipt does not contain all the elements of a "note or memorandum of sale" which the statute contemplates. Among other defects, the property mentioned in it is not described with the necessary particularity as to dimensions and location, which would give a purchaser the

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right to enforce specific performance as against the vendor (*Calkins v. Falk*, 39 *Barb.* 620 ; *Lawson v. Mead*, *H. & D. Supp.* 158). The fact of the defendant having given the plaintiff \$50, and getting receipt therefor, does not constitute an acceptance on his part of the contract sought to be enforced by plaintiff. There is no proof showing that the defendant accepted the receipt as a contract, or that he knew the nature of its contents, or considered it anything more than a mere receipt. And admitting that the \$50 was on account of purchase price, that of itself would not be evidence of a contract to purchase the property (*Baldwin v. Palmer*, 10 *N. Y.* 232 ; *Cagger v. Lansing*, 43 *N. Y.* 553 ; *Fry Spec. Perf.* 260, § 403). The case of *Raubitschek v. Blank* (80 *N. Y.* 482), referred to by the learned judge in his opinion, is not parallel with this case, nor applicable. The parties seeking to enforce their rights in each, occupied different relations, and the check given as part payment in that case, was construed with the receipt and held to form one contract with it ; while in the case at bar, the money given was paid in bills, and was not intended to form any part of the purchase money (*Foot v. Webb*, 59 *Barb.* 38 ; *Buckmaster v. Thompson*, 35 *N. Y.* 558).

PER CURIAM.—The judgment and order should be affirmed, with costs, upon the opinion delivered by the learned judge below on denying plaintiffs' motion for a new trial.

Statement of the Case.

THE FORTY-SECOND ST. AND GRAND ST. FERRY
R. R. CO., RESPONDENT, v. THIRTY-FOURTH ST.
R. R. Co., APPELLANT.

Statutes—construction of—Chapter 252, Laws 1884—meaning of “any portion of a street.”—Public nuisance—Street railroad—Jurisdiction of court—invocable by individual.—Special damage, sufficiency of.

Statutes must be construed in their plain, obvious sense, according to the signification among the people to whom they were directed.

The phrase “portion of any street,” in Laws of 1884, chapter 252, § 14, includes not merely the space occupied by the tracks, but the space on each side of, and between the tracks (in fact, the whole width of the street), along the whole line of the track.

A street surface railroad constructed without legal authority, is a public nuisance.

The fact that one is about to commit an act which would cause a *public nuisance*, gives the court jurisdiction to restrain it.

In such case,—i. e., public nuisance,—it is sufficient to enable an individual to maintain an action for an injunction, that he has suffered, or will suffer therefrom, substantial damage that is special and peculiar to him, as distinguished from the damage which he has suffered or will suffer, as one of the community. The nature or extent of the damage is immaterial, as the injunction does not depend on them.

Houston, etc., R. R. Co. v. Forty-second St. R. R. Co., and Allen v. Same (*Daily Register*, September 9, 1884), distinguished.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 1, 1885.

Appeal by defendant from an order continuing an injunction.

The motion for a continuance was heard on the complaint, verified by Charles Curtis, the president of the plaintiff, and an affidavit of said Curtis. The complaint was as follows :

“The plaintiff, by Freling H. Smith, its attorney, complains and alleges :

“1. That the plaintiff is a corporation duly incorporated under chapter 515 of the laws of 1860, of the state of New York.

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"2. That the plaintiff has heretofore lawfully constructed and operated a street surface railroad over the entire route provided for by its franchise ; that it has lawfully constructed and operated, and now owns, is maintaining and operating a double track street surface railroad from the foot of West Forty-second street, through and upon said Forty-second street to Tenth avenue ; thence southerly down Tenth avenue through and upon the same to Thirty-fourth street ; thence easterly through and upon Thirty-fourth street to Sixth avenue ; thence south-easterly to the Grand street ferry on the East river.

"3. That the distance from the foot of West Forty-second street to Sixth avenue is about one and three-fourths miles.

"4. That the defendant is a private corporation organized under chapter 252 of the laws of 1884, of the state of New York to construct, operate and maintain a street surface railroad from the foot of West Forty-second street through and upon Forty-second street to Tenth avenue ; thence through and upon Tenth avenue to West Thirty-fourth street ; thence through and upon said Thirty-fourth to the East river.

"5. That that portion of Forty-second street lying between Tenth avenue and the Hudson river ; that portion of Tenth avenue lying between Forty-second street and Thirty-fourth street ; that portion of Thirty-fourth street between Tenth avenue and Sixth avenue, are already occupied by the street surface railroad, constructed, owned, and maintained by this plaintiff as aforesaid.

"6. That, although by section 14, of chapter 252, of the laws of 1884, no street surface railroad company can construct, extend or operate its road or tracks in that portion of any street, avenue, road or highway in which a street surface railroad is or shall be lawfully constructed, except with the consent of the company owning and maintaining the same, the defendant wrongfully, unlawfully, in violation of the statute and of the rights of this plaintiff, proposes and threatens to construct and operate with-

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out the consent of the plaintiff, a street surface railroad from Sixth avenue to the foot of West Forty-second street along the route heretofore described, and in that portion of the said streets and avenues in which is situated the street surface railroad owned and maintained by this plaintiff.

"7. Upon information and belief, that the defendant has already applied to the department of public works for leave to take up the pavement, to the end that it may construct and operate said railroad in violation of the plaintiff's rights as aforesaid.

"8. That the construction of a railroad by defendant over such route will inflict irreparable damage upon the plaintiff."

"9. That the plaintiff has no remedy against the violation of its rights aforesaid, nor any way in which it can restrain said violation except this court restrains the same by injunction.

"Wherefore, plaintiff prays, etc."

The affidavit was merely as to those allegations in the complaint not made on said Curtiss' own knowledge. The motion was argued before INGRAHAM, J., who, on granting it, wrote as follows:

"The defendants are organized under chapter 252 of the laws of 1884, for the purpose of constructing and operating a street surface railroad in Forty-second street, Tenth avenue and Thirty-fourth street, in the city of New York.

"The plaintiff for many years prior to the passage of the act of 1884, under legislative authority, operated a street surface railroad in a portion of Forty-second street, Tenth avenue and Thirty-fourth street, included in the route of the defendant's company.

"Section 14, chapter 252 of the laws of 1884, provides that except for necessary crossing, no street surface railroad company shall construct, extend, or operate its road or track in that portion of any street, avenue, road or highway, in which a street surface railroad is or shall be

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lawfully constructed, except with the consent of the company owning or maintaining the same.

“The defendant claims that the prohibition contained in this section, applies only to that portion of the railway or street included within the track of the plaintiff’s road.

“It is an elementary principle governing the interpretation of statutes, that the words of the statute must be construed in their plain obvious sense, according to the signification among the people to whom they were directed (*Matter of O’Neil*, 91 *N. Y.* 516), and taking the words of section 14 in that sense, I think the words ‘portion of any street, avenue, road or highway in which the street railroad is or shall be lawfully constructed,’ mean more than the part of the roadway upon which the tracks of the existing railroad are laid. A street in the city of New York includes the roadway and the sidewalk. Thirty-fourth street includes within its limits the whole strip of land one hundred feet wide from the East to the North river. A portion of such street is not a strip of the roadway or of the sidewalk, but is a part of the whole street. The meaning of the section is not very clear; but taking the words in their ‘plain, obvious sense,’ I am of the opinion that a corporation organized under said act, can have no right to construct a railroad in the streets in which the plaintiff’s road is constructed.

“The power of the legislature to restrict the powers of corporations created by them, cannot be seriously disputed, and the legislature in authorizing the organization of railroad corporations for the purpose of constructing and operating railroads, has power to provide that corporations organized under the provisions of that act, should not operate railroads in certain excepted streets and avenues.

It has been settled by many adjudications in this state, that the construction of a street railroad in one of the streets of this city without legal authority, is a public nuisance (*Davis v. Mayor*, etc., 14 *N. Y.* 506; *Milhau v. Sharp*, 27 *Ib.* 611).

“It is well settled, however, that an action to restrain

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the continuance of a public nuisance cannot be maintained by an individual, without proof that such individual has suffered, or will suffer peculiar or special damage, not sustained by the community at large. The nature or extent of the damage he must sustain in order to be entitled to maintain the action, is not material. The nuisance must cause him a substantial damage, and it must be special to himself as distinguished from one of the community at large. The rule as to the proof of the nature and extent of the damages laid down in the case of *McHenry v. Jewett* (90 N. Y. 62), and cases like it, however, do not apply to the case at bar. In this case the threatened erection of a nuisance gives a court of equity jurisdiction to restrain the illegal act, and a court of equity at the suit of the people would have power to restrain by injunction the proposed erection. "The fact that defendant has committed, or is about to commit an act which would cause a public nuisance, gives the court jurisdiction to restrain the commission of the act (*People v. Vanderbilt*, 26 N. Y. 290). To entitle an individual, however, to maintain such an action, it is necessary to show that the act complained of will cause special damage to the individual (*Doolittle v. Supervisors, &c.*, 18 N. Y. 155). It is sufficient, however, if it appear that the injury complained of will cause damage that is peculiar to the individual, as distinguished from the damage he has suffered as one of the community at large, and such a case should be distinguished from the cases in which the nature and extent of the injury give the court jurisdiction.

"It has been held in many cases in this state, that an action can be maintained by the owner of abutting property to restrain, by injunction, the commission of a nuisance in the street in front of his property. In *Corning v. Lowerre* (6 Johns. Ch. 439), the chancellor held that an abutting owner suffered a special grievance from an obstruction in the street, and that such obstruction worked a special injury (*Clarke v. Blackman*, 47 N. Y. 153; *Milhau v. Sharp, supra*).

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"The case of *Houston St., &c. R. R. Co. v. Forty-second street R. R. Co.*, contained in the *Daily Register*, of September 9, 1884, only held that the plaintiff in that action could not ask the court to prevent the construction of its road in any part of Forty-second street, except the portion occupied by the plaintiff's road. *Allen v. Forty-second street R. R. Co.*, in the same paper, was an action by an abutting owner, and the court held that the defendant had legal authority to construct the road in front of plaintiff's property. Neither of the cases therefore apply, and after a careful examination of the other cases cited by counsel for the defendant, I think the allegations in the complaint that the plaintiff will suffer special damage from the construction of a railroad by defendant, make out a *prima facie* case to justify the granting of an injunction during the pendency of the action.

"Motion must therefore be granted, with ten dollars costs to abide the event."

Wakeman & Latting, attorneys, and *Grosvenor P. Lowrey*, of counsel for appellant, on the questions considered in the opinion, argued:—The plaintiff's cause of action, as pleaded, may be considered in several aspects :

I. As charging the defendant with an attempted usurpation of power without special damage properly alleged.

The legal offense implied in such action is the usurpation of powers not possessed ; and when contemplated by corporate bodies is restrainable in equity only by the attorney general, unless facts showing a special and actionable injury to the plaintiff are averred (*Houston, West St., &c. R. R. Co. v. Forty-second St., &c. Ry. Co.*, *Daily Reg.* Sept. 9, 1884 ; *Christopher & Tenth St. R. R. Co. v. Central Crosstown R. R. Co.*, 67 *Barb.* 315). Such injury does not, in contemplation of law, arise by the mere diversion of traffic, proximity of tracks or diminution of revenue (*N. Y. & Harlem R. R. Co. v. Forty-second Street R. R. Co.*, 50 *Barb.* 285 ; *Smith v. Lockwood*, 13 *Ib.* 209 ;

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Pudsey Gas Co. v. Bradford, &c., 5 *Eng. R.* [Moak's ed.] 788; Stockport v. Manchester, 9 *Jurist N. S.* 266; McHenry v. Jewett, 90 *N. Y.* 58).

II. As charging a threatened violation of plaintiff's rights, and a consequent legal injury to it by disregarding a special franchise pertaining to it, to control the introduction of other surface railways, into a certain part of Thirty-fourth street.

The use of a street by surface railroads is "merely a mode of exercising the right of public travel" (Brooklyn City R. R. v. Coney Island R. R., 35 *Barb.* 368), and was in 1860 withdrawn from the control of the local legislature. Since then, by the constitution, the control of this subject has been confided to, (1) the legislature; (2) the local authorities; (3) the property owners, who must coincide to authorize such use. And now (upon the plaintiff's construction of this act), the legislature has added a fourth, viz., any existing surface railroad company, in possession of a constructed road, and thereby interested to refuse, or make terms for granting, its consent to an exercise of this right of public travel. Now, the plaintiff's claim is that the public shall not have full means of passage through Thirty-fourth street, because it has a special franchise to forbid railroads in a certain portion of Thirty-fourth street (Mayor v. Broadway, &c. R. R., 97 *N. Y.* 281; Mills v. St. Clair Co., 8 *How.* 569; Dolsen v. New York, 17 *Fed. Rep.* 617; Turnpike Co. v. Illinois, 96 *U. S.* 68; Rice v. Railroad, 1 *Black.* 358; Ruggles v. Illinois, 108 *U. S.* 526; Martin v. Wardell, 16 *Pet.* 367). Upon the principles shown in these cases, it is clear that a consequence so unjust and unreasonable as the exclusion of a part of the public from full use of a public street, unless with the consent of a particularly interested carrier company will not be submitted to if the words in question can be made to bear any other reasonable construction. This brings us to the interpretation of chapter 252 of the laws of 1884. To assume that the legislature has intended to grant an exclusive privilege in any given section of the

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street to a private railroad company, is to assume that it has by public bill attempted the granting to a private corporation of an exclusive privilege, immunity or franchise, which is what the constitution forbids to be done by the only method reasonably to be apprehended, *i. e.*, by private or local bill. The prohibition by section 14 of the act, obviously applies to "the use by one company of the tracks or ways of another." This is evident from the exception which allows "necessary crossings," and from the proviso which empowers the court to compel the previously constructing company to give "the right of such use" upon compensation for the use by one company of the tracks of another. The real object of the legislature was, doubtless, to give to existing companies, as agencies of public travel, a more exclusive control of their own tracks by abolishing the application to such property of the power of eminent domain; thus requiring new companies to meet the demands of the old one, or build outside its lines.

III. As attempting to obtain the restraining power of the court, an advantage over the defendant preliminarily to the coming on of negotiations for a joint use of the tracks under the powers given in the act.

The statute is invoked to make plaintiff's consent a necessary condition precedent for us; the action is brought to declare its refusal to consent and to restrain us from proceeding without it; and the next practical step will, doubtless, be the naming of a price at which the consent may be had. For this favoritism they have paid nothing, ventured nothing, sacrificed nothing, nor rendered any public or meritorious service whatever. The public and the property owners were adequately protected by the constitutional provision making their consent a condition precedent. The new power of consenting (even when the public interest does not require it), and of objecting (even when local authorities, the general public and property owners unanimously consent), is manifestly not for the protection of either property owners or public.

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What other interest, then, can the legislature have had in view? Manifestly, only the private interest of existing companies. That interest is divisible into, (1) an interest not to be disturbed in exclusive possession of tracks and ways, (2) an interest not to be competed with in business. It was legitimate for the legislature to guard the first interest by limiting the then existing liability of such property to be expropriated, or otherwise applied to competing public uses. It was not legitimate, and therefore was presumably not meant, to carve out from the general public right still other franchises, and engraft them for its sole use and benefit upon the existing privileges of a private company. But if this *was* meant, and was sought to be effected by imposing a condition impossible of performance, then the court must consider, (1) Whether the condition is not *void*, (a) As operating to diminish the right of the people as *cestuis que trust* under the act of 1813; (b) The power of "local authorities" (acting as public agents, in conjunction with property owners), effectively to control the degree of public use which any street shall serve (*Const. art. 3, § 18*); (c) As an appropriation and assignment to one company (not for public use, but in restraint of such use), of the entire easement-bearing capacity of a street, without compensation to the mayor, &c., as owners of the legal estate therein; (d) As in derogation of the private right of adjacent owners to have (subject to constitutional conditions only), the entire street kept forever fully available for all modes of public travel (*Brooklyn City R. R. v. Coney Island R. R.; Mayor, &c., v. Broadway R. R., supra*); (e) As conferring on a private company a function political in its nature, and, therefore, beyond the power of the legislature to grant, and the capacity of the grantee to receive. (2) Or, if the condition must be held *valid* because it does not contravene any specific terms of the constitution, then the court must consider whether the condition can be pleaded, except by the people suing by their own attorney, to restrain an unlawful usurpation of power, and for the protection of

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purely general and public interests (*Smith v. Lockwood ; Houston, &c. R. R. Co. v. Forty-second, &c. R. R., supra*).

Freling H. Smith, attorney, and of counsel for respondent, on the points considered in the opinion, argued : —I. The claim that section 14 requires the consent of the constructed road, only when the proposed route lies directly over the space included within its tracks, or covered by its cars, is clearly untenable. If such were the case, said section would be meaningless, for without it the road could not be used without its consent. But the language of the section is too plain for doubt. It says : "No street surface railroad company shall construct, extend or operate its road or tracks in that portion of any street," &c.

II. The defendant's proposed road being in violation of section 14 of chapter 252 of the laws of 1884 (under which the defendant is incorporated), is a public nuisance (*Davis v. Mayor, etc.*, 14 N. Y. 506 ; *Doolittle v. Supervisors of Broome Co.*, 18 *Ib.* 155 ; *Harlow v. Hunston*, 6 *Cow.* 189 ; *Congrove v. Smith*, 18 N. Y. 79). And any person sustaining a particular injury thereby may maintain an action (*Moshier v. Utica & Schenectady R. R. Co.*, 8 *Barb.* 427 ; *Doolittle v. Supervisors of Broome Co., supra*), and have an injunction (*Pennman v. N. Y. Balance Co.*, 13 *How. Pr.* 40 ; *Davis v. Mayor, &c.*, 14 N. Y. 506 ; *N. Y. & N. H. R. R. Co. v. Pixley*, 19 *Barb.* 428 ; *Doolittle v. Supervisors of Broome Co., supra* ; *Corning v. Lowerre*, 6 *Johns. Ch.* 439 ; *First Baptist Church v. Sche. & Troy R. R. Co.*, 5 *Barb.* 79 ; *Hart v. Mayor of Albany*, 9 *Wend.* 571 ; 2 *Redfield on Law of Railways*, 379, 380 ; *Spencer v. London & Birmingham R. R. Co.*, 8 *Simons*, 193 ; *Sampson v. Smith, Ib.* 272 ; *Clark v. Blackmar*, 47 N. Y. 150).

III. There can be no serious question as to the special damage which will be inflicted on plaintiff, if defendant is not restrained from constructing the nuisance in ques-

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tion, or that the plaintiff can have no adequate remedy at law. The defendant seeks to parallel plaintiff's road for nearly two miles, and in doing so will have to cross plaintiff's tracks at Sixth avenue and Thirty-fourth street. The court must take judicial notice of the facts that in the work of construction, the streets on each side of plaintiff's tracks must be torn up, and passage to and from its cars obstructed; that in constructing its road across plaintiff's tracks, plaintiff's traffic will be interfered with; that in running its cars, defendant must necessarily, to a considerable extent, interfere with the ingress and egress of passengers to and from plaintiff's cars. In addition to the above, defendant, by operating its proposed road, would become a direct competitor with plaintiff for the carriage of passengers, and would divert a large part of its traffic, and thus diminish its revenues. All these damages must, in the nature of things, follow from the facts stated in the complaint. When the complaint states that the defendant is seeking to construct and operate a street railway in the same streets with plaintiff, under chapter 252 of the laws of 1884, it is equivalent to alleging all these items of damage in detail. Among other reasons, *McHenry v. Jewett* (90 N. Y. 58), has no application, because in case of public nuisance it is not necessary to show irreparable injury. It is sufficient to maintain the action for the plaintiff to show that he will sustain special injury by the threatened act.

IV. The case relied on by the defendant (*N. Y. & H. R. R. Co. v. Forty-second street, &c. R. R. Co.*, 50 *Barb.* 285, 309), to show that diversion of traffic, &c., is not sufficient to authorize this action, does not apply to this case. In that case, the defendant had the *legal right* to construct its road, and it was proceeding to construct it in accordance with the act of its creation. The case is an authority directly in point in plaintiff's favor; for the injunction would have been sustained, if the defendant had not been clothed with authority to construct its road. The above is an answer to the position that the attorney

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general only can bring the action. All the authorities cited by the defendant hold the contrary.

V. Will then the plaintiff suffer special damage if the defendant is permitted to carry out its threats to erect its unlawful structure? Of this there can be no question. Plaintiff is not one of a class who would suffer from loss of traffic, obstructions, &c., but it is the only person or corporation who would suffer in like manner. The damage would be special and peculiar to the plaintiff. It is well settled that an abutting property owner may maintain an action to prevent an unauthorized construction of a street surface railroad, because specially injured (*Milbau v. Sharp*, 15 *Barb.* 193 ; S. C., 17 *Ib.* 425 ; 27 *N. Y.* 611 ; *Wetmore v. Strong*, 22 *Ib.* 414 ; *Doolittle v. Supervisors, &c.*, 18 *N. Y.* 264 ; *Clark v. Blackmore, supra*).

PER CURIAM.—The order appealed from is affirmed with costs, on the opinion of the court below.

MARTIN J. HACKETT, RESPONDENT, v. THE HACKETT HATCH DOOR MANUFACTURING Co.,
APPELLANT.

Royalties, contract for—specific sum for each article—payments to be made every six months—no payment to be less than \$100.

One clause of an agreement called for a payment as a royalty of a specific sum for each article manufactured; a subsequent clause provided that no payments of royalties should be less than \$100, whether doors to cover that amount had been manufactured or not.

Held, construing these clauses with an intermediate one calling for payments of royalties every six months, that plaintiff was entitled to receive \$100 every six months, whether any articles were manufactured or not.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 1, 1885.

Appeal from a judgment in favor of plaintiff, entered on the decision of a judge at special term.

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The action was brought to recover certain royalties. Having come on for trial, it was submitted for decision on the following propositions :—“ *Plaintiff's proposition.* Whether the said Edward M. Hackett, under and by virtue of said agreement with this defendant, is entitled to demand and receive from defendant as part of the consideration for the license to manufacture hatch doors under his patent, the sum of \$100 each and every six months while said agreement remains uncanceled, and until defendant has relieved itself from liability by a written surrender of the license to manufacture as provided for in said agreement. *Defendant's proposition.* On the contrary, that the said Edward M. Hackett, under and by virtue of said agreement is only entitled to demand and receive from defendant royalty, whenever hatch doors have been manufactured, and only for the respective periods of six months, within which they were manufactured, except that in the event of royalty so becoming due within any of such periods, he shall be paid \$100 for each of such periods, whether hatch doors have been manufactured or not to cover that amount of royalty. And that the clause of the agreement permitting the defendant to relieve himself from liability by a written surrender of the license, only has reference to the next preceding clause thereto, by virtue of which (next preceding clause) the defendant is called upon to pay for hatch doors manufactured under patents which are outside of the licensed patent and said agreement, and not to the clause in dispute, which is the next preceding clause but one to such surrender clause and is not connected or associated therewith.

“If the agreement is construed by his honor, in accordance with the first proposition, then the plaintiff is entitled to judgment against the defendant, for the sum of \$500 and costs of this action. If the agreement is construed by his honor in accordance with the second proposition, then the plaintiff is entitled to judgment against the defendant for the sum of \$100 or more for

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each and every half year since November 1, 1881, in which this defendant erected, or caused to be erected, hatch doors, with costs of this action to December 6, 1884, the date of defendant's tender ; the number of half years during which said erections were made, to be hereafter determined by the court, upon proper application, in the event of the counsel for the plaintiff and defendant being unable to agree upon the amount due after an examination of defendant's books."

The material portions of the agreement referred to in the propositions were the fifth, seventh and tenth clauses. The fifth and tenth clauses were as follows : "Fifth. The said party of the fourth part agrees further, as a consideration for this license, to pay to said Edward M. Hackett or his assigns, as a royalty, the sum of \$3 for each and every full door or opening, to which said improvements or any of them may be applied by said party of the fourth part under this license, said royalty to be paid at the times hereinafter provided." "Tenth. It is further expressly agreed between the parties hereto, that upon the failure of the party of the fourth part to make returns, or to make payment of the royalties, as herein provided in the fifth clause of this agreement, at the time therein mentioned, and in the event of their continuing in default in making such returns or making such payments for the period of six months thereafter, then this license and all the rights and privileges granted thereunder shall cease and determine, and the same shall revert to the parties of the first, second and third parts, or assigns ; but the party of the fourth part shall not thereby be discharged from liability then due. It is further agreed between the parties hereto that no payments of royalty shall be less than \$100 whether doors to cover that amount have been manufactured or not ; and they further agree to pay the royalty per door or opening, herein provided to be paid, on every door or opening they shall manufacture or put up, whether under this license or other patents, or both. But it is expressly provided that the parties of the

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fourth part may relieve themselves from said liability under this clause by a written surrender to the parties of the first, second and third parts, or assigns, of this license." The provisions of the seventh clause are sufficiently stated in the opinion.

The judge below decided in favor of plaintiff's proposition, and wrote as follows :

"INGRAHAM, J.—In construing an agreement, effect must be given to every provision in the agreement, and the object is to discover, if possible, the intention of the parties.

"By the fifth clause of the agreement, defendant agreed to pay to plaintiff's assignor \$3 for each and every full door or opening to which the improvement may be applied. By the seventh clause, defendant is to make a return on the first days of May and November, and to pay the amount due. It will be seen that the payments are to be made every six months. The return is to state the number of doors and openings manufactured, and then, at the time of making such return, the defendant is to pay, not \$3 for each door made, but the 'royalties provided to be paid and found due and owing him (plaintiff's assignor).' The tenth clause provides that—'It is further agreed that no payment of royalties shall be less than \$100, whether doors to cover that amount have been manufactured or not.' Effect can be given to this tenth clause only by holding that it was the intention of the parties that the defendant should pay to plaintiff's assignor \$3 for each door manufactured, but whether doors were manufactured or not, to pay \$100 every six months.

"Under the stipulations, therefore, plaintiff is entitled to judgment for \$500 and costs, and judgment is ordered accordingly."

From the judgment entered in conformity with this opinion, defendant appeals.

Appellant's points.

A. J. Todd, attorney, and of counsel for appellant, argued :—I. No such intention can be inferred as is set forth by the court below, in its opinion ; because, until royalty is earned, there is to be nothing paid, nor any account rendered ; and when a payment of royalty is to be made, not less than \$100 is to be paid for such six months then elapsed. The court must therefore find that some royalty has accrued before it can award the plaintiff's \$100 for such six months. Such, and such only, is consistent with the plain reading of said clause, and with the other parts of the agreement calling for an account to be rendered, and the payment of royalty. The said clause plainly says, "no payment of royalties shall be less than \$100," etc. That does not mean that a bonus shall be paid every six months to the plaintiff, that is \$100 "whether hatch doors have been manufactured or not ;" but, on the contrary, when any doors are to be accounted for, at least \$100 must be paid therefor, every six months, if but two or three hatch doors, for instance, have been manufactured. The language of the clause in dispute is expressly guarded. It says, "Whether doors to cover that amount have been manufactured or not." This is significant, and expressive of another construction of the whole clause than the one given by the learned judge in the court below. The conclusion of the learned judge implies that an account must be rendered every six months, assuming that the defendant corporation is not doing any business at all—that is, not manufacturing. This is plainly in violation of the proper reading of the clause of the agreement, calling for an account to be rendered every six months. Certainly no account can be rendered if no hatch doors have been manufactured. And if no account is to be rendered, no payment of royalty is to be made. And if no payment of royalty is to be made, then under the plain reading of the clause in dispute the \$100 is not to be paid. This is clear and conclusive logic, and is fully consistent with the rest of the agreement, while the view of the learned judge below is not.

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William H. Clark, attorney, and of counsel for respondent, argued :—I. The defendant, when the contract was made, guaranteed the plaintiff's assignor that for the license and authority which he had given the defendant to erect doors and openings under his patent, he should have \$3 for every door erected, and at least \$100 every six months. This was evidently the intention of the parties at the time the contract was made, as appears from the tenth paragraph following the clause agreeing to pay \$100 every six months. It is evident that the officers of the defendant company recognized the fact that this payment of \$100 every six months, whether the company was manufacturing doors or not, might at some time become burdensome, hence the insertion of the clause that the license might be surrendered, and this liability terminated.

II. An analysis of the construction which the defendant seeks to have put on this contract, will show that if the defendant manufactured but one door during the first month of one of the periods of six months, it would be liable for \$100, and then it might go on and manufacture thirty-three additional doors, and it would still only be liable to pay Mr. Hackett \$102 for the entire thirty-four, or \$100 for the first door, and about six cents each for the remaining thirty-three. Such a construction would not be consistent with common sense, and it cannot be the intention of the parties, for it would be a nullification of the clause, whereby the defendant agreed to pay \$3 for each and every door erected. The words "as a royalty," in paragraph fifth of the agreement, are used to show the object of the payment of \$3 on each door, and as the word royalty is commonly used and understood, it means that Mr. Hackett is to be paid \$3 on each door erected, as a compensation for the license and authority which he had conferred on the defendant to manufacture those doors, and if this last expression were used instead of the words "as a royalty," there would be no substantial difference in the meaning of the clause in

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dispute, and in that event the argument now attempted to be advanced by the defendant, would be even more clearly without foundation than it is at present.

PER CURIAM.—Judgment affirmed, with costs, on the opinion of the court below.

WILLIAM SULZBACHER, ET AL., AS RECEIVERS, &C.,
RESPONDENTS, v. THE NATIONAL SHOE &
LEATHER BANK, APPELLANT.

ALEXANDER V. DAVIDSON, AS SHERIFF, &C.,
RESPONDENT, v. THE NATIONAL SHOE &
LEATHER BANK, APPELLANT.

Interpleader—relative rights of sheriff under attachment, and receiver.

A motion or an order of interpleader, on ground of danger of being compelled to pay twice, will be denied, where, in the opinion of the court, there is no such danger as forms the foundation of a right to interplead. The above doctrine applied to a case where the sheriff, under attachment, and receivers of property of fraudulent assignors were the claimants.

Venable v. N. Y. Bowery Fire Ins. Co. (49 *Super. Ct.* 481), followed, as to right of attaching creditor.

Before FREEDMAN and TRUAX, JJ.

Decided June 1, 1884.

Appeal from an order made at special term denying a motion made by the defendant in the above action for an interpleader.

The firm of Siedenbach, Schwab & Co., and the individual members thereof, made a general assignment for the benefit of their creditors, to William Sulzbacher, who having realized from the assigned assets, \$50,000, deposited it with said National Shoe and Leather Bank, the defendant, to his credit, and payable to his order, as such assignee. Said Sulzbacher prior to March 17, 1884, drew out of said bank all of said money except \$16,465.42. On May 3, 1884, the sheriff, claiming to have on April, 3, 4,

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5 and 8, 1884, attached said \$16,465.42, under attachment issued against the property of said assignors, in suits commenced against them by divers of their creditors, commenced the second above entitled action against the bank, to recover the amount so claimed to have been attached, with interest. On March 14, 1884, other creditors commenced an action against the assignors and assignee, to set aside the assignment as fraudulent and void as against creditors, and prayed for the appointment of a receiver. Such proceedings were had in that action that on November 25, 1884, a judgment was entered setting the assignment aside, and declaring it to be void, and appointing said William Sulzbacher and John F. Plummer receivers of the property of the assignors, and ordering the assignee to pay and deliver all the money and property assigned to him and the proceeds thereof to the receivers. Thereafter said William Sulzbacher as such assignee drew his check on the bank for said sum of \$16,465.42 payable to the order of the receivers; the receivers indorsed it and presented it with a certified copy of the judgment of November 25, and demanded its payment, which was refused. Thereupon the first above entitled action was brought to recover said sum of \$16,465.42.

The bank moved that the plaintiffs in the first above entitled action be substituted in its place as defendants in the second above entitled action, and that the plaintiff in the second above entitled action be substituted in its place as defendant in the first above entitled action, and it be discharged from all liability to either of the parties upon its paying into court the said sum of \$16,465.42. The motion was denied, and the bank appealed from the order entered on such denial.

SEDGWICK, Ch. J., in denying the motion at special term, wrote as follows :—"On the facts, the defendant is not in that danger of being compelled to pay twice, which is the equitable foundation of a right to have rival claim.

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ants intervene. The nature of the controversy is such that ordinary diligence will enable the defendants to be informed of facts which will make it clear to whom that duty lies (*Thurber v. Blanck*, 50 *N. Y.* 80).

"Motion denied with \$10 costs to each defendant, to abide the event of the respective actions."

George C. Lay, attorney, and of counsel for appellant, as bearing on the point of sufficient danger, argued:—I. The bank is ignorant of the rights of the rival claimants (*Mohawk & Hudson R. R. Co. v. Clute*, 4 *Paige*, 384; *Shaw v. Coster*, 8 *Ib.* 339; *Wilson v. Duncan*, 11 *Abb. Pr.* 3).

II. The court below evidently regarded the question involved in the sheriff's action as so free from doubt as to make the cause of action frivolous; but we beg to suggest that the uncertainty of litigation is a factor that cannot be overlooked. What will be the result of the sheriff's action? He may amend his complaint on the trial, and follow the money in bank on some other theory than that alleged in his complaint. The court of appeals may, five years hence, take a different view of the sheriff's right to enforce attachments or to maintain creditors' actions. Even that high court has been known to reverse its own decisions. The court practically says to the bank, decide for yourself the merits of the conflicting claims, and if you are wrong in your judgment bear the loss yourself—a court of equity cannot aid you. We submit with confidence that true principles of equity, applied to this case, will lead to the reversal of the order.

III. A bank may interplead rival claimants to a fund on deposit, especially where there has been an assignment by the depositor, legal or equitable, or by operation of law (*German Exchange Bank v. Commissioners*, 6 *Abb. N. C.* 394; *City Bank v. Skelton*, 2 *Blatchf.* 14; *Marvin v. Elwood*, 11 *Paige*, 365; *Bell v. Hunt*, 3 *Barb. Ch.* 391).

IV. There is a reasonable doubt as to which of the claimants the money is due. The claim of the sheriff is

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not frivolous on its face. The authorities cited to support the proposition that an interpleader will not be granted where it clearly appears on the face of the papers that the claim of the third party is frivolous and without validity, are mostly cases in which well settled principles of common law were involved. Of this character, see *Trigg v. Hiltz* (17 *Abb. Pr.* 436); *Pustel v. Flannelly* (60 *How. Pr.* 67). These cases, and similar ones, do not apply where the questions are novel, involving statutory rights and duties of public officers, where the law is in a transition state, which is the case before the court, for the bank is under no common law liability to either party. There is no privity of contract. The receivers seek to enforce a liability of the bank to the assignee, whose right to the money has been taken away by a decree of the court setting aside the assignment. The sheriff seeks to enforce a statutory cause of action which has been the subject of many conflicting decisions (*Wait on Fraudulent Conveyances*, 122-125).

Stern & Myers, attorneys, and of counsel for the receivers, respondents, as bearing on the question of sufficiency of danger, argued :—I. The person asking the relief must be in such doubt as to the facts underlying the rival claims, as to be in actual peril of paying twice. This peril must not result from any act or omission of his (3 *Pomeroy's Eq. Juris.* 346, *et seq.*; *Willard's Eq. Juris.* 314; *Atkinson v. Manks*, 1 *Cow.* 703; 2 *Story's Eq.* 12, *et seq.*).

II. There is no doubt as to which claimant is entitled to the fund. The title of the receivers to choses in action relates back to the date of the original assignment for the benefit of creditors (*Clark v. Brockway*, 1 *Abb. Ct. App.* 351). The attachments upon which the sheriff's suit is based, were issued long after the assignment. The receivers' title is therefore paramount. Interpleader by motion has repeatedly been refused in cases like the one at bar (*Venable v. Bowery Ins. Co.*, 49 *Super. Ct.* 481;

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Conner, Sheriff *v.* Weber, 12 *Hun*, 580). But even if the law were less certain, the bank cannot ask an interpleader unless the facts underlying the rival claims are doubtful. Questions of law it must decide for itself. Mere ignorance of the facts which give rise to the stakeholder's duty will not protect him. It must be such ignorance or doubt as cannot be removed by a diligent investigation (*Wilson v. Duncan*, 11 *Abb. Pr.* 3; *Shaw v. Coster*, 8 *Paige*, 347; *Marvin v. Elwood*, 11 *Paige Ch.* 363). Is the bank in any peril? We answer, No. The law is settled; the facts are clear. Indeed, the bank has demurred to the sheriff's complaint, and declares his claim to be unfounded. "But," says the bank, "our demurrer may be overruled; or, the complaint may be amended, or a higher court may change the existing law, and thus imperil us." This has been answered above. The bank must determine the existing law for itself, and unless it can show that the facts are doubtful, it cannot obtain an interpleader.

III. No case cited by the bank is in conflict with the position taken by us. The case of the German Exch. Bank *v.* Commissioners, &c. (6 *Abb. N. C.* 394), arose upon rival claims made by certain excise commissioners and their predecessors, who had been removed. The depositor claimed the money, and his successor claimed it. The facts and the points decided do not touch the case at bar. If the receivers and the late assignee (who was the depositor), were the rival claimants here, the case might apply. The case of *Wilson v. Duncan* (8 *Abb. Pr.* 354), which the learned counsel treats as his leading case, was a special term decision, and was reversed by the general term of this court (*Wilson v. Duncan*, 11 *Abb.* 3). *Marvin v. Ellwood* (11 *Paige*, 365), is not at all in point as to its facts. The question there decided turned on the relation of attorney and client.

W. Bourke Cockran, attorney, and of counsel for respondent Davidson.

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PER CURIAM.—The order appealed from is affirmed with costs, for the reasons assigned by the special term, and on the authority of *Venable v. N. Y. Bowery Fire Ins. Co.* (49 *Super. Ct.* 481).

WILLIAM P. ABENDROTH v. THE MANHATTAN RY.
CO. AND THE NEW YORK R. R. CO.

Public highways, established and used prior to the conquest of New Netherlands—Abutting owners have no interest or easement therein by reason of the mere fact of abutment.—Pearl street, history of—is such a public highway—rights of abutting owners therein.

The fee of public highways established and opened prior to the conquest of the New Netherlands, on such conquest passed to and vested absolutely in the British crown. By operation of the Dongan charter and the act of the legislature of March 7, 1793, the fee of those of such highways as were within the limits of the city of New York, passed to and vested in the city of New York. The city under the Dongan charter is vested with power to adopt a public road in use within its limits at the time of such conquest, and to maintain it as a public street, thereby dedicating it as a public street. Such dedication, however, does not operate as a transfer of the property in the soil, and an abutting owner does not thereby acquire any easement in the street itself as distinct from the public at large, or any property therein, nor can he acquire any title therein by prescription. So far as public rights or interests are concerned, the legislature has supreme control over them and may regulate the public use, changing one kind into another.

Upon these principles, *held*, as to an owner of property on Pearl street (it being found as matter of fact that Pearl street existed as a public street prior to the conquest of the New Netherlands, and it not appearing that said owner had acquired any interest in the street since that time), that he had no property or easement in the street, and therefore was not entitled to an injunction against defendants, restraining them from maintaining, continuing or operating the structures of an elevated railroad in that street (which they were authorized to do by the legislature and the city), on the ground of the taking by them of this property without his consent or compensating him therefor.

Before INGRAHAM, J., at Special Term.

Decided June 4, 1885.

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Action to restrain the defendants, The Manhattan Railway Co. and the New York Railroad Co. from obstructing or incumbering Pearl street, or for maintaining, continuing or operating the structure of the elevated railroad in Pearl street, in the city of New York.

The facts appear in the opinion.

E. B. Cowles, for plaintiff.

E. C. James, and *Davies, Cole & Rapallo*, for defendants.

INGRAHAM, J.—That the structure of the elevated railroad in Pearl street, materially interferes with the light of the plaintiff's premises, and that the maintenance of the structure and operation of the road is a serious injury to plaintiff's property, is established by the evidence.

That the defendant, the New York Elevated Railroad Co., was authorized by the legislature and by the city of New York to construct and operate an elevated road through Pearl street, was not disputed on the trial of this case, and plaintiff cannot maintain this action unless it appears that by the construction or maintenance of the railroad, some property of the plaintiff has been taken by the defendants without his consent, or without compensating him therefor.

It appears that long prior to the year 1664, a ferry was established from the present Peck Slip, on Manhattan Island, to a point on Long Island; and that a road was in use from the New York landing, along the East river shore on the present line of Pearl street to Hanover square (See *Valentine's History of New York*, 31, 72). In the grant made by Cornelius Van Tirnhoven to Stoffel Edwarstsen of a parcel of land south of the present Fulton Slip, dated July 8, 1656, the road on the river is mentioned, the property being bounded "on the south side by the road on the river." See also map called the Duke's Plan, dated in 1664, and which purports to be a plan of the town as it was in 1661, and by that plan a road is laid out on the river. See also the grant from Governor Nichols,

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made on April 4, 1661, to Nicholas Davies, which granted liberty to erect and build a convenient wharf at the water side in the Smith Valley, and which contained this provision: "Always provided the erecting the said wharf shall in no way stop up or be prejudicial to the highway, which is to remain a good breadth, and convenient for carts and passengers." The Smith Valley appears to have extended from the foot of William street (Old Slip) to about Beekman street (See *Hoffman's Treatise of the Estate and Rights of the Corporation of the City of New York as Proprietors*, vol. 1, 231). By an ordinance of 1694, this street, or road, running from Burgher's Path to the further end of the Smith Valley was to be called Queen street, and from that time down, it appears on all of the old maps of the city as Queen street (See map in evidence dated 1738). On the plan of New York dated 1695, and published in a manual of the city of New York for the year 1851, on page 136, Queen street is laid out as running north from the water gate at the foot of the present Wall street to a point above plaintiff's property. By an act of the colonial assembly of New York, passed on June 19, 1703, commissioners were appointed to lay out a road or highway from New York, through Westchester county to Connecticut, and their survey was made and filed on June 16, 1707. They reported that among other roads, they had established a road "from the gate at the end of Queen street by a small turning northerly until it meets with the other road at fresh water." This gate at the end of Queen street, mentioned in the report, appears to have been about one hundred and fifty feet easterly from the corner of Beekman and Pearl streets.

It appears, therefore, that Queen street was open and in use as a road to that point (See *Hoffman's Treatise*, 249. 254; see also diagram No. 13, *Hoffman's Treatise*. 214).

I think, therefore, that it is established by the evidence that Pearl street in front of plaintiff's premises was in use as a public road or street prior to the conquest of the New Netherlands by the English, and that whatever right the

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Dutch government had in and to such street, passed to the conquerors and vested absolutely in the British crown. In the case of *Dunham v. Williams* (37 N. Y. 251), the court of appeals held that the title to the road-bed of a highway laid out prior to the conquest by the English was in the government ; that the government was the absolute owner of the fee ; that no one had a present or reversionary title in the soil of the public highway on the ground that he was the owner of the lands through which it was laid. See also *Hoffman's Treatise* (Vol. 1, 2d ed. p. 305), where it is said, "It is the undoubted rule of that law that highways belong to the sovereign power, as part of the royalties or public rights ; they belong to it absolutely. There is no right in the adjacent owners to the soil of the street, either during the use or upon a discontinuance ;" and (on page 312), where the learned author says, "I think it may be considered as a very clear proposition that the title in the fee of the soil of all streets open prior to 1664, passes from the Dutch to the English sovereign, and under the patent to the Duke of York, passed as a royalty, and from him to the crown and to the state, unless the right went to the corporation under the Dongan charter."

The supreme court of Louisiana has held that where public places have been created by the sovereign power, this power may authorize the municipal corporation interested in such places, to alien or change their use or designation whenever the public interest require it, and that the rights of the owners of property in the vicinity are subordinate to the paramount right of the legislature (*Mayor, &c. v. Hopkins*, 13 La. 326 ; *Same v. Leverich*, 13 Ib. 332).

The absolute fee, therefore, of Pearl street, vested in the crown ; and on April 22, 1686, by the Dongan charter, "all and every the streets, lanes, highways and alleys within the said city of New York, or Manhattan Island aforesaid," were granted to the mayor, aldermen and commonalty of the city of New York, for the public use and service of said mayor, aldermen and commonalty of the

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city of New York, and the inhabitants of Manhattan Island aforesaid, and the travelers there, "to hold to their several and respective heirs and assigns forever."

It is not material in determining this controversy whether the fee of the street passed to the city of New York by this charter, for by the act of March 7, 1793, all the estate, right and title and interest of the people in the streets or highways in the city of New York were vested in the city for the use of streets and highways, and by that act whatever right or property in the street that did not pass by the charter vested in the city of New York.

It is, however, clear that the owners of property abutting on this street, at the time of the conquest of the city by the English, as distinct from the other inhabitants of city, had no right or property in Pearl street, and unless it appears that they have acquired some interest in the street since that time, no property of the plaintiff's has been taken by the defendants.

By the Dongan charter, the mayor, aldermen and commonalty of the city of New York were given power and authority to establish and appoint, order and direct the establishing, making, laying out, ordering, amending and repairing of all streets, lanes, alleys, highways, &c., in and throughout the said city of New York and Manhattan Island aforesaid, and by the Montgomery charter, dated January 15, 1730, this grant was ratified and confirmed, and it was provided that the mayor, aldermen and commonalty of the city of New York and their successors forever, should have full power, license and authority to lay out streets, lanes, alleys and highways, and to alter, amend and repair all such streets, lanes, &c., theretofore made or laid out, in such manner as the common council for the time being, or a major part of them, should think or judge to be necessary and convenient for all the inhabitants and travelers there. Under the authority thus given, the city of New York had power to adopt a public road then in use, and to maintain it as a public street (See opinion of TRACY, J., in *Story v. N. Y. Elevated R. R.*

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Co., 90 N. Y. 122). It appears, therefore, that under this power and authority given by the charters, this public road was adopted, and maintained by the city of New York as Queen street, and was thereby dedicated as a public street. Subject, however, to this dedication to the public, the city remained the absolute owner of the street, and, subject to the control of the legislature, could make any use of the street not inconsistent with the right acquired by the public by the dedication.

In the case of *Sir John Ladd v. Shephard* (2 *Strange*, 1004), one of the first cases in which the effect of the dedication of a road or highway to the public was considered, it was held that the dedication of a highway to the public was a right of passage and not a transfer of the property in the soil, and this principle has been almost universally followed and is now the settled law of this state (See *Pearsall v. Post*, 20 *Wend.* 111 ; *Bloomfield, &c. Co. v. Calkins*, 62 N. Y. 386).

The owners of the property abutting on the street had, in common with the other inhabitants of the city, the right to have this street kept open as a public street, but this dedication did not give to an abutting owner any property in the street. By such dedication, an abutting owner, as distinct from the public, acquired no easement in the street itself. The dedication was not to him but to the public. No grant was made to him. There was no covenant of the city, either express or implied to the abutting owner as an individual, that the street should be kept open as a public street, or that he should have or enjoy any peculiar right or easement in the street itself. Whatever right he took under the dedication, he took as one of the public, and not as an individual. The plaintiff, therefore, as an abutting owner, could have no property in the street by reason of its dedication by the city of New York (*Brooklyn Park Commrs. v. Armstrong*, 45 N. Y. 234).

There is no evidence in this case to show when a house was first erected on the premises in question. It does appear that a house had been on the premises upwards of

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forty years. Plaintiff or his grantors could not, however, acquire any right to the street by prescription. It is well settled that no one can acquire a title by prescription in a public street or highway; an individual using it would raise no particular grant in his favor (*Burbank v. Fay*, 65 N. Y. 57; *Wheeler v. Clark*, 58 *Ib.* 267).

The case of *Story v. New York Elevated R. R. Co.* (90 N. Y. 122), does not sustain plaintiff's right to an easement in Pearl street. In that case the court held that the grant by the city of the land bounded by the street, gave to an abutting owner the easement as appurtenant to the piece of land granted, and the decision of the case depended on the extent of the easement granted. The grant of the city was held to have created the easement. DANFORTH, J., says, at page 144: "It is not necessary to consider the effect of the circumstances I have now adverted to, upon the rights of the public in the street in question. It is conceded to be a public street. But besides the right of passage, which the grantee as one of the public acquired, he gained certain other rights as purchaser of the lot, and became entitled to all the advantages which attached to it. The official survey, its filing in a public office, the conveyance by deed referring to that survey, and containing a covenant for the construction of the street, and its maintenance, makes as to him and the lot purchased, a dedication of it to that use for which it was constructed. There was thus secured to the plaintiff the right and privilege of having the street forever open as such." See also opinion of TRACY, J., on page 166: "The city of New York, having power to lay out and open streets, and to acquire lands for such purposes, had power to dedicate *its own lands* to such uses, and to bind itself by a covenant with its grantees of abutting lands, that a particular street should forever be kept as a public street. What interest, then, if any, did the grantee acquire in the bed of the street by such grant and covenant?" And on page 178, in stating the conclusions to which the court had arrived, he says: "First. That the

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plaintiff, by force of the grant of the city made to his grantors, had the right or privilege in Front street which entitled him to have the same kept open and continued as a public street for the benefit of his abutting property."

That case therefore does not hold that an easement exists in favor of an abutting owner where there was no grant, either express or implied, to the owner of the adjacent property by the city, or the owner of the fee of the street.

In *Mahady v. Bushwick Railroad Co.* (91 N. Y. 148), it does not appear how the city acquired the fee of the street in question, and as what was there said was on the authority of the *Story* case (*supra*), it must be presumed that the property of the plaintiff in that street was created in the same way as the plaintiff's property in the street in the *Story* case.

In no case that has been cited, or that I have been able to discover, has it been held that the mere fact that a piece of property abutted on a street or highway, gave the owner of the property as an individual, as distinct from the public, any property in the street or highway, and every case in this state in which a use of a highway or street authorized by the legislature has been enjoined, is either where the plaintiff owned the fee of the street, as in *Williams v. N. Y. Central R. R. Co.* (16 N. Y. 97), and *Wager v. Troy Union R. R. Co.* (25 N. Y. 526), where the abutting owner was the owner of the easement in the street acquired by grant, either express or implied, as the *Story* case (*supra*), or the fee of the street had been acquired by the city under the provisions of the act of 1813, which provided that the fee should vest in the city, in trust that the same be appropriated and kept open as and for a public street forever, as in *Peyser v. N. Y. Elevated R. R. Co.* (12 *Abb. N. C.* 276).

In the case of *Irving Bank v. Manhattan Elevated R. R. Co.*, the owner of both the fee of the street and the lot, conveyed the lot bounding it on the street, and that was

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held to give the grantee the same easement in the street that the grant by the city gave to the plaintiff in the Story case.

The grant by the Dongan charter to the corporation of the city of New York, "Of the streets, highways, lanes and alleys within the city of New York and Manhattan Island aforesaid, for the public use and service of the said mayor, aldermen and commonalty of the said city, and of the inhabitants of Manhattan Island and the travelers there," did not give the plaintiff or his grantors, as distinct from the other inhabitants of the said city, any interest or property in the streets included with the grant. Whatever right was reserved by the grant was vested in the British crown, and passed to the people of the state.

It is well settled in this state by a long line of decisions, that so far as public rights or interests in the street or highway are concerned, the legislature has supreme control over them, that where no private property is taken, the legislature may regulate such public use; may change one kind of public use into another, and as to the interest or property vested in the public, may control or dispose of it in any way (*People v. Kerr*, 27 *N. Y.* 188; *Kellinger v. Forty-second street R. R. Co.*, 50 *Ib.* 206; *Wagner v. Troy Union R. R. Co.*, 25 *Ib.* 526). See also the matter of the New York Elevated Railroad, general term, supreme court, March, 1885; and cases there cited.

In the case of the Brooklyn Park Commissioners v. Armstrong (45 *N. Y.* 234), the court of appeals held that the legislature had power to authorize a municipal corporation to sell property acquired by it under the right of eminent domain, for the purpose of a park. That the fact that the city had made and filed a map on which the property was laid out as a park, and that adjoining property had been bought and sold and paid greater taxes and assessments to the city, and upon the assumption that the property in question should remain a park, did not create an implied contract between the city and the owners of the property. And that in the absence of any direct or

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particular relation between the city and the owner of the real estate, the legislature could direct that the property should be diverted from that purpose and sold, or otherwise disposed of.

Having carefully considered the questions involved in this case, I am of the opinion that on the evidence as it stands, plaintiff has no interest or property in Pearl street in front of his premises that has been appropriated or used by the defendants, and that the defendants are entitled to judgment.

That the erection and maintenance of the railroad in Pearl street has caused serious injury to plaintiff's property is established, but entertaining the opinion before expressed, the court can give him no relief without overturning principles that have been long settled in this state.

Judgment is therefore ordered for defendant, with costs. Findings to be settled on two days' notice.

WILLIAM MOORES, RESPONDENT, v. CHARLES LEHMAN, IMPEADED, &C., APPELLANT.

Ejectment.—Pleading.—Requisites of complaint.

Where a complaint in an action of ejectment does not set forth that defendant unlawfully withholds, or that he entered without the consent of the plaintiff, or in anywise wrongfully, or that plaintiff is entitled to the immediate possession of the premises, and does not contain any equivalent allegation, it will be held bad on demurrer.

It will not be presumed that defendant, in such case, is a wrongdoer.

The presumption is that one in possession is lawfully in possession.

Except in matters of form, it is still the rule to construe pleadings most strongly against the pleader.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided June 5, 1885.

Appellant's points.

Appeal by defendant from judgment entered against him upon a demurrer and from the order overruling the demurrer.

The facts appear in the opinion.

John Townshend, for appellant :—I. The form prescribed by the revised statutes, when in force, indicates very clearly what are the facts which still constitute a cause of action. (1) Plaintiff in possession. (2) While plaintiff in possession defendant entered. (3) And *unlawfully* withholds possession. The last requirement is not met by the complaint. The presumption is that one in possession is lawfully in possession (*Hill v. Draper*, 10 *Barb.* 454; *Maltoner v. Dominick*, 4 *Ib.* 466). The court will not presume in favor of a plaintiff anything he has not alleged (*Cruger v. Hudson R. R. Co.*, 12 *N. Y.* 190; *Malone v. Sherman*, 94 *Super. Ct.* 530; *Parkhurst v. Wolf*, 47 *Ib.* 320; *People v. Fadner*, 10 *Abb. N. C.* 462). A pleading cannot be sustained upon implications unless they necessarily follow from what has been alleged (*Magauran v. Tiffany*, 62 *How. Pr.* 251). Except in matters of form "it is still the rule to construe doubtful pleadings most strongly against the pleader" . . . "when a pleading is susceptible of two meanings that shall be taken which is most unfavorable to the pleader" (*Clark v. Dillon*, 31 *Alb. L. J.* 155, Nov., 1884). Courts ought not to encourage loose or ambiguous pleading (*Cook v. Warren*, 88 *N. Y.* 40).

II. To recover real estate, it is necessary for the plaintiff to prove that he is the owner of the property, and that the defendant withholds from him the possession *without right* (*Sanders v. Levy*, 16 *How. Pr.* 312). The possession must be *unlawfully* withheld from plaintiff, and that fact must affirmatively appear upon the face of the complaint (*Taylor v. Crane*, 15 *How. Pr.* 359; *Moak's Sandford Pldgs.* 326; *Sedgwick & Wait, Trial to Land*, § 433; 5 *Wait's Practice*, 839; *People v. Mayor, &c.*, 28 *Barb.* 248).

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Robert L. Wensley, for respondent :—I. It is contended by defendant's counsel, that from all that appears in the complaint, the defendant, *Lehman*, may be lawfully in possession. If the tenancy of either of the defendants was lawful, as against the plaintiff, then the possession of the defendant would be the possession of the plaintiff, and in a legal sense he could not be said to *withhold* the possession from plaintiff.

II. The mere use of the word "unlawfully" in the complaint for which defendant contends, would be simply the statement of plaintiff's conclusion as to the character of the occupancy, and would not be the statement of a fact, and could therefore have no influence for or against the sufficiency of the complaint, and as a matter of good pleading, ought not to be inserted (*Russell v. Clapp*, 7 *Barb.* 483 ; *Ensign v. Sherman*, 14 *How.* 442), and if inserted the demurrer would not admit its truth (*Kinnier v. Kinnier*, 45 *N. Y.* 539).

III. The statement of the single fact that plaintiff is the owner in fee simple absolute of the premises is sufficient to show that he is entitled to the possession of the land until the defendant shows a right of possession in himself. Plaintiff in his complaint is not required to anticipate every defense to his action, nor to negative every state of facts under which defendants might be entitled to the possession of the premises against the owner of the fee (*Metropolitan Life Ins. Co. v. Meeker*, 85 *N. Y.* 614 ; *Cohen v. Continental Life Ins. Co.*, 69 *Id.* 304). Nor to state conclusions which are to be implied from the facts stated (*Case v. Carroll*, 35 *N. Y.* 391). But only to state facts which, if proved, will entitle him to judgment (*Russell v. Clapp*, 7 *Barb.* 483).

BY THE COURT.—FREEDMAN, J.—This action is one in ejectment. The complaint alleges that the plaintiff is seized in fee simple absolute of certain premises particularly described therein, and which are located in the city of New York ; that the defendant, *Lehman*, was and is

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the occupant of the said premises, and that he so occupies the same under a lease of tenancy from, or by agreement with, and consent of defendant, Townshend ; and that the defendant, Townshend, is in possession of the premises, and withholds possession thereof from the plaintiff, although plaintiff has demanded from said defendant the delivery to him of such possession of said premises ; to plaintiff's damage, as is alleged, in the sum of \$1,000. The judgment demanded is the immediate possession of the premises, and \$1,000 damages, for the withholding of such possession.

The defendant Lehman demurred on the ground that the complaint does not state facts sufficient to constitute a cause of action against him.

The complaint in an action of ejectment is now governed by the rules which apply to complaints in all other actions, and, amongst other things, such a complaint must state facts sufficient to constitute a cause of action.

In the case at bar, the complaint does not allege either that the defendants unlawfully withhold, or that the defendants entered without the consent of the plaintiff, or in any wise wrongfully, nor that plaintiff is entitled to the immediate possession of the premises. Without some one of these allegations, or some equivalent allegation, it will not be presumed that the defendants are wrongdoers. The presumption is that one in possession is lawfully in possession (*Hill v. Draper*, 10 *Barb.* 454).

Except in matters of form, it is still the rule to construe doubtful pleadings most strongly against the pleader, and when a pleading is susceptible of two meanings, that is taken which is most unfavorable to the pleader (*Clark v. Dillon*, 97 *N. Y.* 370).

For all that appears, the defendant Townshend may be in possession under a lease from the plaintiff which has not yet expired, and hence the implication does not follow from what has been alleged, that he unlawfully withholds. The court at special term therefore erred in overruling the demurrer.

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The judgment and order should be reversed with costs, and the defendant Lehman should have judgment upon the demurrer with costs, with leave, however, to the plaintiff to amend his complaint upon payment of both bills of costs.

SEDGWICK, Ch. J., concurred.

CHANDLER H. LOOMIS v. JOSEPH B. HOYT,
ET AL.

Special partnership—statutory requirements as to—when liable as general partners.—Pleading—When complaint need not allege special partnership.

An affidavit that the special capital of a limited partnership has been actually and in good faith paid in, and in cash, is false, and no limited partnership is formed, and all the parties are liable as general partners, where it appears that the special partners drew their checks for the amount of the special capital, and the same were deposited to the credit of the new firm, which thereupon drew and delivered its checks for like amounts in favor of said special partners; it further appearing that these checks were given to pay money due them from a former partnership which the same parties had endeavored to form, but failed, because no affidavit of payment of special capital had ever been made or filed.

Where the assumed limited partnership carries on the business of commission merchants in New York county, and such is stated to be its business in the certificate there filed, and it is also engaged in the business of tanning leather in another county, no copy of the above certificate being filed in said county, no limited partnership is formed, and the parties are liable as general partners.

In an action in which it is sought to charge all the parties assuming to form a special partnership as general partners, by reason of their failure to comply with the statutory requirements, the complaint need not be in terms founded on the statute, and an allegation therein of general partnership is sufficient, and admits proof of failure to comply with such requirements, though the answer be a general denial.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided June 19, 1885.

Plaintiff's points.

Action on a promissory note. At the trial, a verdict was directed in favor of the plaintiff, and defendants' exceptions were ordered to be heard in the first instance at the general term.

The facts appear in the opinion.

Clarence W. Francis, and Hamilton Odell, for plaintiff :—I. Upon the proofs, a plain fraud was perpetrated in the formation of this alleged special partnership. Every cent contributed by the special partners as capital, was immediately withdrawn by them, not on account of any indebtedness due to them from the partnership, but in payment of indebtedness said to be due to them from an old general partnership which, for several years prior thereto, had existed between these defendants.

II. The regular and proper course was for the plaintiff to charge defendants in the complaint as general partners (*Stone v. De Puga*, 4 *Sand.* 681 ; *Sharpe v. Hutchinson*, 49 *Super. Ct.* 50). A cause of action is not created or given against a special partner by the statute, by the making and filing of a false affidavit, but a strict compliance with the provisions of the statute by those who seek to avail of its benefits, is a condition precedent to any restriction upon the liability for the firm debts of the so-called special partners. Therefore, the action should be in form against all the partners as general partners, and the restricted liability under the statute should be matter of defense (*Haviland v. Chace*, 39 *Barb.* 283 ; *Bell v. Merrifield*, 28 *Hun*, 222 ; *R. S.* title 1, of *Limited Partnership*, § 8). The Pennsylvania statute provides (in the very language of our own) : " If any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners." See *Andrews v. Schote* (10 *Barr*, 51) ; *Vandike v. Roskam* (67 *Pa.* 333). The Massachusetts statute provides that—" If a false statement shall be made in such certificate, all the parties shall be

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liable as general partners." See *Pierce v. Bryant* (5 *Allen*, 91).

Durant v. Abendroth (97 *N. Y.* 132), is distinguishable from this case. In his discussion of the questions involved there, Judge RAPALLO uses this language, which, it is claimed, sustains the objection taken by the defendants in this case: "Notwithstanding the erroneous statement in the affidavit as to the payment of the capital, the partnership was in form a limited partnership, and subject to all the rules applicable to such partnerships. If it had undertaken to make an assignment with preferences, such assignment could not have been sustained on the ground of the violation of the statute. That violation could be taken advantage of only by creditors, and its consequence simply was to give them recourse against the special partner personally, as if he had been a general partner." The partnership, the judge said, was a limited partnership *in form*. So it was, but not *in fact*. Having attempted to avail themselves of the privileges of the statute, and having held themselves out to all the world as a special partnership, and induced the public to deal with them in that character, *the defendants* were estopped to deny that such a partnership existed; they could not make an assignment giving preferences, after having obtained credit on the assurance that the partnership assets were secured by the statute to an equal distribution among all the creditors. That is the point of the decision, and it goes no further.

II. The limited partnership was not formed, and the defendants were liable to be sued as general partners, because no transcript of the certificate, etc., was filed in the office of the clerk of the county of Cattaraugus, where George Palen & Co. carried on a portion of their business (*Statute as to Limited Partnerships*, § 6). The certificate in this case declares that "the general nature of the business (of George Palen & Co.), to be transacted, is the hide, leather, oil and commission business in the city of New York." The testimony of George Palen is that the firm

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from its beginning was also engaged in the business of tanning leather at Limestone, in the county of Cattaraugus, and at Elmira, in the county of Chemung. The certificate of the clerk of Cattaraugus county shows (*Code*, § 921), that no transcript of the certificate of formation of this limited partnership was ever filed or recorded in his office. Therefore, such partnership cannot "be deemed to have been formed," but George Palen & Co. were a general partnership for all purposes. There is as much reason why the general nature of the contemplated business of a limited partnership should be truthfully announced as there is why the amount of its special capital should be. Both enter into the question of the amount of credit to which the partnership is entitled. Parties dealing with the firm and giving it credit, or asked to give it credit, are entitled to know to what hazards the capital of the concern is exposed; and it is very plain that there is a wide difference in the matter of risk, between manufacturing and vending. A man who claims a restricted liability under a statute must keep within it. He cannot publish that he is going to transact a particular business in a particular place, and then branch out into a different business in a different place, and still claim exemption from a general liability.

Arnoux, Ritch & Woodford, William H. Arnoux, of counsel for defendants:—I. If the pleader, when drawing his complaint, intended to prove that a special partnership had been formed, and that the special partner had become liable as a general partner by reason of any act that made him so liable, he failed to comply with the provisions of the Code requiring the complaint to state the facts upon which he expected to recover. In *Sharp v. Hutchinson* (49 *Super. Ct.* 50), the court, in deciding the case, prefaced its ruling with the following observations and questions which are applicable to the case at bar: "If, in this action, the defendant had not in the answer set up the existence of the limited partnership, it might have per-

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haps been necessary to determine whether an allegation of general partnership is supported by proof that the certificate or affidavit, filed under the statute, to form a limited partnership, was false. One question would be: does the negating the assertions of the certificate or affidavit tend to show that such facts as are essential to co-partnership had an existence? Or, does it tend only to show the liability of a partner under the statute? Another question would be: if it tend to show only the latter, must not the special facts, which, under the statute, create the liability, be pleaded?"

Stone v. De Puga (4 *Sand.* 681), is not an authority which can avail the plaintiff in this case. It was decided under the law as it stood prior to the amendment of 1851, and holds and was bound to hold, under that system of practice, that the various acts which it was claimed would have made De Puga, under the statute, liable as a general partner must be pleaded, but that the pleading, where it was to be inserted, was the reply instead of the complaint. Under the law as it stood in 1851, it may have been enough to allege some of the facts in the reply, but under the law as it has been since 1852, the complaint must state every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer. The Code requires of a plaintiff that his complaint shall contain a plain and concise statement of the facts constituting each cause of action. The plaintiff was permitted to prove each and every fact contained in his complaint. That was all he could be permitted to prove against defendant's objection (*Allen v. Patterson*, 7 *N. Y.* 478; *Mann v. Morewood*, 5 *Sand.* 557; *Lienan v. Lincoln*, 2 *Duer*, 670; *Adams v. Mayor*, 4 *Ib.* 295; *Hilsen v. Tibby*, 44 *Super. Ct.* 12; *Moak's Van Santvoort's Pleading*, 163; *Cook v. Warren*, 88 *N. Y.* 40; *Wright v. Hooker*, 10 *Ib.* 59; *Hudson v. Swan*, 83 *Ib.* 552; *Southwick v. First National Bank*, 84 *Ib.* 428; *Fuller v. Lewis*, 3 *Abb. Pr.* 383; *Sandford v. Drew*, 3 *Duer*, 632).

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But whether such allegations should be pleaded in the complaint, as these authorities hold, or whether in the reply, as laid down in *Stone v. De Puga*, is wholly immaterial. The essential fact in all cases being that somewhere, and at some time, the allegations necessary to allow the admission of the requisite proof must be pleaded. Here they were not pleaded, and therefore could not be offered in evidence.

Who could imagine what court could learn from these pleadings that the plaintiff intended to try a question relating to a special partnership? Nay, more, who can tell what question on that subject the court did try? Was it a return of the moneys contributed? Was it a failure to file a certificate in the county where defendants had a tannery? It is possible to raise numberless questions on this issue if allowed.

Even if the defendants were *pro hac vice*, general partners, such partnership liability, under the circumstances of this case, arose, not out of a contract between the partners, but out of a statutory liability, and therefore the allegation of partnership was not a statement of fact, but a conclusion of law, and the facts leading to that conclusion should have been pleaded. The evidence offered was objected to for want of such plea. Plaintiff had an opportunity to amend his plea, and he refused.

III. Whether the complaint be sufficient or otherwise, the evidence fails to establish the allegation that the defendants are partners, and therefore as such jointly liable to the plaintiff on the promissory note sued on.

The complaint sets forth that the defendants were co-partners—that is, general partners; the proof offered tended to show that by reason of defect in the formation of the special partnership, the defendant was liable as a general partner. The statute draws a distinction between the failure to take the formal steps to form a limited partnership, and the falsity of the allegations in such formal proceedings. In the former case, no limited partnership is formed, and the parties are general partners.

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In the latter case, a limited partnership to all the intents and purposes is formed, except as to exemption from liability for debts of the firm. Thus, in the case of *Durant v. Abendroth* (97 N. Y. 132), the court has clearly defined the limit to the violation of the provisions of the statute. Applying that decision to this case, it is apparent that no amount of proof of erroneous statement in the affidavit as to any of the facts therein contained could make the partnership in question a general partnership, or enable it to make a general assignment with preferences. If this position is a correct, logical deduction from the statute, and upon the decision above cited, then the evidence received by the court was not sufficient to fasten upon the defendant the liability of a general partner.

BY THE COURT.—FREEDMAN, J.—The action is based on a promissory note, dated October 30, 1882, and made and indorsed by the firm of George Palen & Co., and the complaint charges the defendants with having been the partners who composed that firm. The several answers of the defendants served, either consisted of, or amounted to, a general denial. At the trial, the defendants offered no evidence, and rested their rights upon plaintiff's case.

It appeared that on December 31, 1881, the several defendants executed a certificate, whereby they assumed to form a limited partnership. The defendants Knight and George R. Palen were named as general partners. The defendants Hoyt, Ladew, Fayerweather and Jane R. Palen were named as special partners. Each special partner was to contribute the sum of \$50,000 towards the capital of the partnership, and each of them did, on the day named, pay in a check for that amount. These checks were deposited in the Mechanics' Bank, to the credit of the firm of George Palen & Co., and thereupon the said firm at once drew its four checks against this deposit, each for the sum of \$50,000, in favor of the four special partners respectively. The firm of George Palen & Co., thus assumed to have been formed, was not at all

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indebted at the time to either of the said special partners, but the checks were given to pay them money that was due to them from a former partnership.

As regards such former partnership, it appeared that on November 1, 1876, these same six parties had assumed to form a limited partnership under the statute, which was to terminate on January 1, 1882, but that they had failed to accomplish the purpose, because no affidavit of the payment of the special capital had ever been made or filed as required by the statute (1 *Edm. R. S.* 716, §§ 7 and 8).

The proof therefore showed that, though the form was gone through with on December 31, 1881, of paying in the special capital, the money was not paid in by the special partners with any intent that it should be devoted to the business of the new firm, or be subject to its obligations or risks. It was not, therefore, a case of misappropriation of the special capital by the general partners, but of an immediate withdrawal of the special capital by the joint act of the generals and specials, for the sole benefit of the specials, and in pursuance of a premeditated and carefully prepared plan. Consequently, the affidavit made by George Palen on December 31, 1881, to the effect that the special capital had been actually and in good faith paid in, and in cash, was false.

The further fact appeared that George Palen & Co. were engaged in business as commission merchants in the city of New York, and also in the business of tanning leather in the county of Cattaraugus, and that no copy of the certificate of December 31, 1881, had ever been filed or recorded in that county, as required by the sixth section of the statute.

Upon these facts there can be no doubt that the defendants failed to accomplish their purpose of forming a limited partnership, and that under section 8 of the statute, they are all liable in a proper action for all the engagements of their firm as general partners.

The defendants contend, however, and most of their

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exceptions to the admission of evidence, and all their exceptions to the refusal of the court to dismiss the complaint, were taken upon the theory that they are not liable in the action as brought, because the complaint should have been in terms founded upon the statute.

The contention is clearly not well founded, so far as the defendants are concerned who were confessedly general partners ; and as to those who claim to have been special partners, the point may be deemed to have been decided against them in this court in *Stone v. De Puga* (4 *Sandf.* 681). That the state of the Code then in force, which made a reply to new matter in the answer necessary, if it was to be controverted, does not affect the question under the Code of Civil Procedure, has been held in *Sharp v. Hutchinson* (49 *Super. Ct.* 50). Nor can it make any difference in the case at bar, that the defendants interposed a general denial, pure and simple, unaccompanied by a plea of special partnership. If a plaintiff may declare upon a particular cause of action, his right so to proceed can not be wiped out by the nature of defendant's answer. In the present case, the cause of action has not been created or given by statute against the defendants who claim to have been special partners. They intended to, and in fact did enter into a partnership. If, in doing so, they had strictly complied with the provisions of the statute, which are conditions precedent, they might claim certain benefits under the statute. Having failed to do so, and yet having participated in the partnership business, they cannot claim the said benefits, but are liable to third persons as in case of a partnership at common law. Section 8 of the statute expressly says, that in such a case no *limited* partnership shall be deemed to have been formed, and that all the persons interested in such partnership shall be liable for all the engagements thereof as general partners. This is a mere re-enactment of the common law doctrine upon the subject. The question seems to have been carefully considered by the supreme court in *Haviland v. Chace* (39 *Barb.* 283).

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The head-note accurately states the point decided, viz : "If the provisions of the statute are not complied with, the limited partnership is not formed, and if a false affidavit in respect to the payment in cash of the sums alleged to have been contributed by the special partners is filed, all the partners will be liable for all the engagements of the partnership as general partners."

The claim of surprise advanced by the defendants, is equally untenable. In point of fact, no motion was made at the trial on any such ground. As to cases which may hereafter arise, it is sufficient to point out that, whenever it shall be satisfactorily shown that a defendant has been surprised, the court may, and no doubt will, upon such terms as may be just, grant an adjournment. As a general rule of pleading, a plaintiff is bound only to set forth the ultimate facts which constitute his cause of action, viz : a partnership, and if, thereupon, the defendant claims that he was only a partner of a particular kind, and as such exempt from liability under the statute, the burden is upon him to show that he earned his exemption by a full and fair compliance with the provisions of the statute. In this there is no hardship, for the matters upon which his exemption depends, are matters peculiarly within his own knowledge.

Upon a careful examination of the whole case, it fully appears that none of the exceptions taken by the defendants is tenable.

The exceptions of the defendants should be overruled, and judgment ordered upon the verdict in favor of the plaintiff, with costs.

SEDGWICK, Ch. J., concurred.

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Respondent's points.

THE PETREL GUANO CO., APPELLANT v. THE PROVIDENCE, WASHINGTON INSURANCE CO., RESPONDENT.

Insurance—Wager policy.—Burden of proof as to insurable interest.

In an action on a policy of marine insurance, the complaint alleged ownership of the property in question by the assured, which was denied by the answer. On the trial the only evidence in support of the allegation was the policy of insurance containing the following clause : "S. K. Schwenk" (the assured), "on account of whom it may concern, in case of loss, to be paid to him or order, does make insurance and cause himself to be insured, etc." and also written assignments thereof showing title thereto in plaintiff.

Held, that the complaint was properly dismissed ; that the burden of proof was on plaintiff to establish an insurable interest, without which the policy was a mere wager.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided June 19, 1885.

Appeal by the plaintiff from judgment entered in favor of defendant upon the dismissal of the complaint at the trial.

Action upon a policy of insurance containing the following clause :

"S. K. Schwenck, on account of whom it may concern, in case of loss, to be paid to him or order, does make insurance and cause himself to be insured, lost or not lost, at and from New York via Norfolk to St. Anns with privilege, &c." The policy was duly introduced in evidence.

Further facts appear in the opinion.

Wakeman & Latting, for appellant.

Edward D. McCarthy, for respondent.—In every contract of marine insurance, there must be an insurable interest, and in an action on a marine policy, the complaint must allege it, and the evidence establish it. Here it is alleged, that one Schwenck was the owner of the subject insured, which was merchandise under deck, bound to St. Anns. But there is no evidence to sustain the allegation.

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For anything that appears in this case, the policy was a mere wager. Hence, if Schwenk had no interest, he assigned nothing to Ritchie, and the latter assigned nothing to the plaintiff (*Marshall*, book 1, 97; *Murdock v. Chenango Ins. Co.*, 2 *Coms.* 210).

BY THE COURT.—FREEDMAN, J.—This action is brought on a policy of insurance, issued on merchandise under deck, shipped on board the bark David A. Preston. It is not a case for a reformation of the policy, nor a case on a contract broader than the policy, of which the policy constitutes only a part, but a case on the policy as it stands. The policy, therefore, represents the final contract between the parties, into which all prior negotiations between them have been merged, and hence parol testimony to change its meaning was properly excluded at the trial.

The policy was taken out by one S. K. Schwenk, “on account of whom it may concern,” the loss, if any, to be paid to him or order. The complaint alleges that said Schwenk “was, at the time of the commencement of the risk and thereafter until the said loss, the legal owner and possessor of said insured merchandise, and that thereafter for value he duly assigned his interest in the said policy and to the claim and cause of action thereunder, herein set forth, to E. Lucien Richie and to his assigns; and that thereafter for value the said Richie duly assigned the said assigned interest in said claim and cause of action to this plaintiff, who is now the legal and equitable holder and owner thereof. For that the said Schwenk and Richie were, at the times hereinbefore mentioned, trustees of the plaintiff, and did what they did in and about the insurance and matters aforesaid, as such trustees, and for the benefit of the plaintiff and in furtherance of its business, and for the purposes for which the plaintiff was incorporated.” These allegations were duly put in issue by the answer, and consequently the burden of proof was upon the plaintiff to establish an insurable interest. Without such proof, the policy was a mere wager. The point was

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distinctly raised, among others, on the motion to dismiss the complaint. The plaintiff failed to make such proof. The most it did was to produce the assignments. They constituted a mere formal title on paper which amounted to nothing, unless Schwenk had an insurable interest, of which no evidence whatever was given.

The complaint was therefore properly dismissed. Under the circumstances, it is not necessary to notice any of the other grounds.

The judgment should be affirmed, with costs.

SEDGWICK, Ch. J., concurred.

C. FAYETTE TAYLOR, ET AL., RESPONDENTS, v. THE METROPOLITAN ELEVATED R'Y CO., ET AL., APPELLANTS.

Demurrer to complaint and supplemental complaint—misjoinder of parties and of causes of action.—Discontinuance—how effected.

Where the complaint sets forth a cause of action arising out of injury to real property,—viz., a lease of certain premises, owned by the two plaintiffs,—caused by the building and operation of an elevated railroad, and the supplemental complaint alleges an assignment to one of the plaintiffs, of all the interest of the other in said claim, and also sets forth a cause of action for personal injuries in behalf of the plaintiff to whom the assignment is made,—viz., for injuries to his health, &c., arising from the building and operation of said road,—no change being made in the supplemental complaint as to the title of the action or description of the parties, and no leave to discontinue as to the plaintiff making the assignment having been obtained—a demurrer to the whole pleading will be sustained; first, because, one of said two causes of action does not affect all the parties; and second, because one of the causes of action falls under subd. 2 of section 484 of the Code of Civil Procedure, and the other under subd. 4, and since they do not arise out of the same transaction, they are improperly united.

That two causes of action which cannot properly be united, are stated in one count, does not deprive defendant of his right to demur for misjoinder.

Opinion of the Court, by TRUAX, J.

Before FREEDMAN and TRUAX, JJ.

Decided June 19, 1885.

Appeal from an order denying a motion made by defendants for leave to withdraw their answer to the original complaint, and their demurrer to the supplemental complaint, and for leave to demur to the complaint and the supplemental complaint taken together as the complaint in the action, and for such other and further relief as may be just.

Davies & Rapallo, for the appellants.

Wm. W. Badger, for the respondents.

BY THE COURT.—TRUAX, J.—If a demurrer to the complaint on any of the grounds stated in the motion papers will lie, the order appealed from should be reversed ; if it will not lie, the order should be affirmed. The grounds of demurrer stated are that there is a misjoinder of parties plaintiff ; that several causes of action have been improperly united ; and that the complaint does not state facts sufficient to constitute a cause of action

The supplemental complaint shows that one of the plaintiffs, Thomas L. M. Chrystie, has assigned "all his right, title and interest in and to this action and its proceeds, and to all causes of action of every kind existing in his favor against the defendants, or either of them," to the other plaintiff. But it nowhere appears that the action has been discontinued as to him. He is called a plaintiff in the supplemental complaint, he is named in the summons as one of the plaintiffs. But the fact that he has parted with his cause of action, and is no longer interested in obtaining the relief demanded, is not equivalent to a discontinuance of the action as to him. He must obtain the leave of the court before he can discontinue the action. This leave he has not yet obtained, and therefore he still continues to be a party plaintiff.

The plaintiffs allege, in their supplemental complaint, among other things, that one of the plaintiffs, Taylor,

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“has been damaged, and has suffered great inconvenience and annoyance, much personal discomfort and loss of health and strength, and of sight and hearing, and has been caused great sufferings and pains and sickness by the wrongful acts of the defendants” in building and running their railroad. This is a cause of action for personal injuries to the plaintiff Taylor, and comes within subdivision 2 of section 484 of the Code of Civil Procedure. It does not affect the plaintiff Chrystie.

The plaintiffs allege in their amended complaint that they have a lease of a certain piece of real estate situate on the line of the defendant's road, and that their interests in this property have been injured by the wrongful acts of the defendants in building and running said road. This is the cause of action mentioned in subdivision 4 of section 484; it is a cause of action for injuries to certain real property which belongs to both of the plaintiffs. It is not an action for personal injuries (*subd. 9, § 3343, Code Civ. Proc.*). It has been improperly united to an action for personal injuries, for section 484 allows a plaintiff to unite two causes of action only where they both belong to one of the subdivisions of that section. But in this case, one of the causes of action belongs to subdivision 2, while the other belongs to subdivision 4 of that section.

The two causes of action have been improperly united for another reason, viz., one of them does not affect all the parties to the action (see last paragraph of section 484).

The plaintiffs contend that the two causes of action have not been improperly united because they both “arise out of the same transaction.” That is not the fact. It does not follow that both causes of action arise out of the same transaction, because the same act renders the defendants liable in both causes of action (*Keep v. Kaufman, 36 Super. Ct. 141; aff'd, 56 N. Y. 332; cited with approval in 64 Ib. 178*). The transaction first above mentioned is an injury to the person of the plaintiff Taylor, while the transaction secondly above mentioned

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is an injury to property that belongs to both of the plaintiffs. These are not the same transaction.

The fact that the plaintiffs have stated the two causes of action in one count, instead of stating them as two causes of action, does not deprive the defendants of their right to demur (*Wiles v. Suydam*, 64 N. Y. 173; *Goldberg v. Utley*, 60 *Ib.* 427).

I am of the opinion that the causes of action have been improperly united, and that the order should be reversed, with costs, and the motion granted, with \$10 costs.

FREEDMAN, J., concurred.

MARIA C. COOK, APPELLANT, v. PAUL RIEF,
RESPONDENT.

Libel and slander—Pleading—Application of words to defendant.

The words "Those people up-stairs keep a whore-house," are actionable *per se*.

Where the complaint alleges that the above words were spoken "concerning" plaintiff, such allegation is sufficient under the Code, to connect the plaintiff with the words, "the people up-stairs," and will admit proof that plaintiff was one of the people referred to.

Fleischmann v. Bennett (87 N. Y. 231), distinguished.

Before SEDGWICK, Ch. J., and TRUAX, J.

Decided June 19, 1885.

Appeal from an order dismissing the complaint, and from the judgment entered against the plaintiff, and from the order denying the motion for a new trial.

The complaint alleges "that on the 4th day of October, 1884, at or near the premises No. 77 Grand street, in the city of New York, the defendant, in the presence and hearing of a number of persons, maliciously spoke concerning the plaintiff, the following false and defamatory words, viz: 'Those people up-stairs keep a whore-house,

Respondent's points.

and I can prove it,' meaning thereby this plaintiff, whereby plaintiff was injured in her reputation to the damage of \$5,000."

The answer was a general denial.

The trial judge dismissed the complaint on the ground that it did not set forth facts sufficient to constitute a cause of action.

Henry C. Andrews, for appellant.—I. The complaint is sufficient. The material allegations where the words are defamatory on their face, and in the English language, are : that defendant with malice (*Viele v. Gray*, 10 *Abb. Pr.* 1), spoke in the hearing or presence of any persons (*Wood v. Gilchrist*, 1 *C. R.* 117), concerning the plaintiff (*Code Civ. Pro.* § 535), the false, slanderous matter.

II. The words are actionable *per se*, because they impute to plaintiff an indictable offense, and involving moral turpitude (*Penal Code*, § 322; *Martin v. Stillwell*, 13 *Johns.* 275; *Wright v. Paige*, 36 *Barb.* 438; 3 *Keyes*, 581; *Anon., Cro. Eliz.* 643; *Brayne v. Cooper*, 5 *M. & W.* 249; *Huckle v. Reynolds*, 7 *C. B. N. S.* 114). It was therefore unnecessary to plead an innuendo or an averment that the words uttered were intended to impute the offense (*More v. Bennett*, 48 *N. Y.* 472; *Carroll v. White*, 33 *Barb.* 615; *Croswell v. Weed*, 25 *Wend.* 621). It is sufficient to say they were uttered concerning the plaintiff (*Wesley v. Bennett*, 5 *Abb. Pr.* 498; *Malone v. Stilwell*, 15 *Ib.* 426; *Code Civ. Pro.* § 535).

J. H. Whitelegge, for respondent.—If the words charged to have been spoken, were in fact uttered by defendant, there is no fact therein disclosed whereby the court can determine that the language was applied to, or had the remotest reference to the plaintiff. The complaint alleges no facts showing either that plaintiff was "those people," or that she was "up-stairs," at any place at or near No. 77 Grand street, or elsewhere in that neighborhood, or that she was known there. The allegation that the words were spoken of, and "concerning the

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plaintiff," and the words :—" Meaning thereby this plaintiff," are insufficient to constitute a cause of action when connected with the alleged slanderous words.

The language charged to defendant relates to a plurality of people, having no relation to or with the plaintiff, so far as the complaint shows. In *Fleishman v. Bennett*, in which the main question involved was, whether the libelous language set up applied to the plaintiff, the court of appeals (87 *N. Y.* 231), say : " An innuendo in a complaint . . . does not enlarge the matter constituting the alleged libel, but only explains its application ; and when not justified by the alleged libelous statement to which it refers, so that rejecting it, the words are not libelous, a demurrer will lie."

BY THE COURT.—TRUAX, J.—Section 535 of the Code of Civil Procedure says that it is not necessary, in an action for libel or slander, to state in the complaint any extrinsic fact, for the purpose of showing the application to the plaintiff, of the defamatory matter ; but the plaintiff may state, generally, that it was published or spoken concerning him.

The words here are actionable *per se*. The only extrinsic fact necessary for the plaintiff to show in order to maintain her action, is the fact that she was one of those people up-stairs. She has alleged, in the words of the Code, that they were spoken " concerning " her, and by demurring to the complaint, the defendant has admitted the truth of this allegation. On the trial the plaintiff could have proved under this allegation, that she was one of those people up-stairs (*Wesley v. Bennett*, 6 *Duer*, 688 ; 5 *Abb.* 498 ; *Malone v. Stilwell*, 15 *Ib.* 421 ; *Parker v. Raymond*, 3 *Abb. N. S.* 343).

This case is to be distinguished from the case of *Fleischmann v. Bennett* (87 *N. Y.* 231). In that case the libelous article assailed the firm of Gaff, *Fleischmann & Co.*, but the plaintiff alleged, and on the demurrer it was taken as true, that he was not, and never had been a

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member of that firm, and, therefore, the court held that the words used had no application to the plaintiff. It is as though the plaintiff in this case, had alleged that she was not one of "those people up-stairs."

The judgment and order appealed from are reversed, and a new trial is ordered, with costs to the appellant to abide the event.

SEDGWICK, Ch. J., concurred.

FRANCIS F. MORTON, ET AL., RESPONDENTS, v. OLIFF
F. HARRISON, APPELLANT.

Building contract—Substantial performance in good faith—Waiver of said compliance—questions for the jury—Acceptance—Non-completion by day fixed, excuse for, and effect of—Damages in case of substantial, but not strict performance, evidence as to.

A contract called for the building of a twelve-inch wall from the foundation to the top of the iron cornice or basement floor joist. It was, in fact, built only to the underside of girder. The upper stories settled from one to one and a half inches. Defendant claimed this was the result of not building said wall as high as called for, the neglect to do which was a serious and substantial violation of the contract. There was evidence tending to show that when this wall came to be built, it was found that it would be improper and unsafe to carry it up further than was in fact done; that to carry it up further would jeopardize the whole building; that the course actually adopted was the proper one; that the settling was due to other causes, for which defendant's agents were responsible; it was also proved that the architect's superintendant directed this deviation because it was in his opinion necessary, and any other course would have caused the whole building to settle. *Held*, that it was properly submitted to the jury to determine whether the wall as built was a substantial performance in good faith, of the contract.

In the case at bar, there was evidence to the effect that defendant's agents frequently visited the building, and were active in their criticism of the work, and that their presence had placed them in a position where they must have known of the manner in which the provision of the contract as to the twelve-inch wall was being carried out. *Held*, that it was

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properly submitted to the jury to determine whether there had been a material variation without the consent of defendant, under a charge which instructed the jury that *an acceptance* might be implied from the acts of the party; but that the mere occupancy of a building is *not a waiver* of strict performance.

Where there are changes in the plans, which, either of themselves, or by reason of necessitating other changes, or by reason of delay in directing them, or by reason of the delay of other workmen in furnishing the articles necessary for the change, or by reason of all these circumstances combined, delay the completion of the contract, or the owner's neglect to exercise an option which he retains at the proper time, causes delay. *Held*, proper to submit to jury whether such delays excused non-completion by the day fixed, and if they did, then whether the work was completed within a reasonable time, under a charge instructing them that if non-completion by the time fixed was excused, then the plaintiffs (the contractors), were to complete the work only within a reasonable time.

In case of a substantial but not strict performance of the contract, the measure of damages is the difference between the value of the house, as in fact finished, and as it would have been if the provisions of the contract had been strictly complied with. Evidence of cost to make conformity is immaterial and irrelevant to the inquiry as to this difference, in a case where it is manifest that to make such conformity would involve the destruction of so much work already done, and the doing of so much not originally contemplated by the parties as not to give the jury any reliable aid in ascertaining such difference.

Before SEDGWICK, Ch. J., and O'GORMAN, J.

Decided June 26, 1885.

Appeal from a judgment entered against the defendant, February 19, 1884, for \$40,385.09, on a verdict rendered in plaintiffs' favor, and from an order denying a motion for a new trial.

Action upon a building contract.

The cause was tried before TRUAX, J., who charged the jury as follows:—

"The plaintiffs allege that in February, 1882. they entered into a contract with the defendant to make certain changes in a building on the south side of Forty-second street, in this city, according to certain plans and specifications, and that the defendant agreed to have those

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changes made prior to or on July 1, of that year. The plaintiffs say they have complied substantially with all the requirements of their contract. They admit that there was a delay in the completion of the building, but they say that that delay was not caused by any neglect on their part, but was caused by and through the neglect of the defendant. The defendant admits the making of the contract; but he denies that the contract has been performed as it should have been, and he alleges that the delay which it is admitted occurred, was not through or on account of any action on his part. He denies that the delays in finishing the building and completing the work to be done under the contract, were caused by modifications of, or deviations in the work, varying it from the original contract, or that any such modifications or deviations were made at the request of the defendant or his agents; and he expressly alleges that such delays and failure to complete the work were wholly through, and the result of the carelessness and neglect and improper conduct of the plaintiffs. The questions for you to determine, therefore, are: Have the plaintiffs substantially complied with the covenants and conditions of their contract in the building they have given to the defendant? and, second, were the delays in handing over the building on July 1, caused by the plaintiffs, or caused by the defendant? The plaintiffs, as I have told you, say the delay was owing to the changes made in the plans and specifications, by the defendant through his agents. But it is for you to say what is the fact. Did the plans show and call for a Whittier elevator, or did they call for some other? If, as they have stated, the plans call for a Whittier elevator, then a change was made, and that change excuses any delay caused by such change. In relation to the water-closets, I do not remember that there is any evidence (and if there is, I ask counsel to call attention to it now) that the plans called for any particular water-closet."

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Mr. Norwood.—"They were to be as in 'the Benedick.'"

THE COURT—"I am of opinion, and so charge, that the plans did not specifically call for the same appliances that there were in the 'Benedick.' If that be the fact—if the plans and specifications did not call for any particular water-closet—then, I charge you, it became the duty of the defendant to notify the plaintiffs, in due time, what water-closet he required; because it would not be just for the defendant to wait until the last day of June to inform the plaintiffs what water-closets he wanted, and on that day say, 'put in such a water-closet,' and then charge them with delay in not having them in by July 1. When did the defendant, then, inform the plaintiffs what water-closet he wanted? The plaintiff, Mr. Chesley, as I remember the evidence, said it was in June. The defendant, on the other hand, or his agent, produced a letter, dated May 23, in which he notified the plaintiffs what water-closet he wanted. So that I think you may take it for granted that on May 23, 1882, the defendant did notify the plaintiffs that a certain water-closet was required in the building. Was that notification a sufficient length of time before July 1, to give the plaintiffs an opportunity to get the water-closets in there? In other words, was any delay caused in the construction of the building by the failure of the defendant to inform the plaintiffs until May 23,—what water-closet was needed? You will consider that in relation to the question of delay.

"There was some evidence, too, as to the fire escapes. Now the contract says that the defendant may, if he sees fit, have a fire escape in the building. It was his duty, then, to notify the plaintiffs at a reasonable time before July 1, what kind of a fire escape he wanted, so that the plaintiffs might put it up there; and if he failed to do so, that failure would excuse the plaintiffs for delay caused thereby.

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“So much for the facts of the case in relation to the question of delay.”

“There is a question now, as to the compliance by the plaintiffs with the conditions of their contract—whether they performed the covenants of their contract. Have they built the building according to the plans and specifications? Now a literal compliance is not entirely requisite. Have they substantially built the building according to the terms of the contract?

“I charge you that, in order to justify a recovery, before you can find a verdict for the plaintiffs, the defects, if there be any, must be only in the minor details, and must not pervade the whole building. I charge you that if there was any material variation from the specifications, without the consent of the owner, and this material variation runs through the whole building, so that the defendant has not got what he contracted to get, then the plaintiffs are not entitled to recover in this action. I say, ‘without the consent of the owner.’ By that I mean without the consent of Mr. Clement or Mr. Ellis, who were the agents of the owner—without the consent of the owner or his agents; and this consent may be implied from the acts as well as from the express words of the owner or his agents. In other words, is there such a state of facts as would warrant you in concluding from the evidence, that, with full knowledge of the condition in which the work had been done, the defendant accepted the work? If there be any such facts, and you can fairly draw that conclusion from those facts, then I charge you that there has been an acceptance. In other words, it is not necessary that an acceptance should be in the words ‘I accept.’ You may imply it from the acts of the party. But the acceptance of the architects is not the acceptance of the defendant in this action; because there is no evidence (I charge you) that the architects were agents of the defendant, so that they could bind him by accepting the work.

“I also charge you that the occupation of the building

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by the defendant is not a waiver of strict performance of the contract; that a party is entitled to retain, without compensation, the benefit of a partial performance, where, from the nature of the contract, he must receive such benefits in advance of a full performance, and is, by the contract, under no obligation to pay until the performance is complete.

“In relation to the changes in the contract, I have charged you that the architects were not the agents of the defendant, and that they had no right to make any change without the consent of the defendant. There must be no willful deviation from the specifications, and if there was any such deviation, there must be a verdict for the defendant, unless the defendant or his agent has consented thereto.

“While the plaintiffs were under obligation to comply with the contract and specifications, still, if the defendant knew that they had not so complied, and accepted and paid for the work then done, without objection, you would be entitled to consider that as a waiver of strict compliance.

“The plaintiffs claim that they have fully and sufficiently performed their contract according to its terms, and according to the specifications and plans, and that the matters which are the subject of complaint by the defendant, are not attributable to any failure in performance by the plaintiffs, and in considering this claim of the plaintiffs, you are instructed that the rule of law is that if you find that the proof supports this claim, the plaintiffs are entitled to your verdict.

“There has been evidence that there was a defect or deflection in the walls. If this deflection in the walls was caused by the plans not being the right kind of plans for the building—if it was caused through a defect in the plans instead of a defect in the construction of the work by the plaintiffs, then that is not the plaintiffs’ mistake, and they are not responsible for it—it is the mistake of the defendant.

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“If you find that the plaintiffs have performed their contract in every respect except as to time, and you further find that the delay in completing the contract by the time specified, was attributable to changes in the work from the original contract and specifications made at the request of the defendant, of those acting for him, then the plaintiff can recover, notwithstanding such delay.

“A substantial compliance only is required, and if the owner suffers the builder to go on after the time limited has expired, with knowledge of its condition, without expressing disapproval, he waives the forfeiture which he might otherwise have claimed. He was bound to express his dissatisfaction at the delay ; and if he intended to take advantage of it, should have acted with promptness at the time, instead of allowing the contractor to expend time and money in the completion of the work.

“If the plaintiffs were proceeding to complete their contract according to its terms, and according to the specifications, and changes were made in reference to the elevator, water-closets, or in any other respects, at the request of the defendant or his agent, and such changes, or any of them, prevented the completion of the contract by July 1, 1882, then the plaintiffs are excused for not completing at that date. If you find any of the facts that I have mentioned, which excused the non-completion by July 1, 1882, then the plaintiffs were bound to complete the work only within a reasonable time ; what was a reasonable time is a question to be determined by the jury from the circumstances of the case.

“Where a builder has in good faith intended to comply with the contract, and has substantially complied with it, although there may be slight defects or unintentional omissions, he may recover the contract price, less the damage on account of such defects ; if the jury find the general purpose of the contract between the parties has been accomplished, the plaintiffs are entitled to recover upon the contract.

“The principal question is perhaps, in relation to the

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compliance by the plaintiffs, with the terms of their contract, in respect to this twelve-inch wall. I leave it for you to determine, whether the twelve-inch wall was completed substantially as required by the terms and specifications of the contract. If you come to the conclusion that the twelve-inch wall, as built, is substantially what the contract calls for, although it may not be the one in every particular, then your verdict will be for the plaintiffs. If, on the other hand, you come to the conclusion that it is an entirely different thing, and does not do the work which was required of it, and which a wall specified in the plans would do, then I charge you the plaintiffs have not performed their contract and cannot recover in this action. I leave that fact for you to determine."

Billings & Cardozo, attorneys, *Coles Morris* and *Michael H. Cardozo*, of counsel for appellant, cited authorities to the following propositions which they urged:—I. The full performance by the plaintiffs of their contract with the defendant was a condition precedent to their recovery in this action, and there was no such substantial performance shown as entitled them to a verdict (*Heckman v. Pinkney*, 31 N. Y. 211; S. C., 8 *Daly*, 466; *Woodward v. Fuller*, 80 N. Y. 312; *Glacius v. Black*, 61 *Ib.* 563; S. C., 50 *Ib.* 145; *Crane v. Knubel*, 34 *Super. Ct.* 443; affirmed, 61 N. Y. 645; *Smith v. Brady*, 17 *Ib.* 173; *Phillip v. Gallant*, 62 *Ib.* 264; *Walker v. Millard*, 29 *Ib.* 375; *Pullman v. Corning*, 9 *Ib.* 93; *Sinclair v. Tallmadge*, 35 *Barb.* 602; *Smith v. Gugerty*, 4 *Ib.* 614; *Bonnesteel v. The Mayor*, 6 *Bosw.* 560; affirmed, 22 N. Y. 162).

II. The contract expressly required the work and finish to be done thereunder to the satisfaction of the owner, the defendant, and the trial court erred in refusing to give any effect to this clause of the contract (*President, &c. of D. & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250, 258). Such clauses are frequently found in contracts, and the courts of this and other states have always given effect to them (*McKensie v. Decker*, 94 N.

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Y. 650 ; *Gray v. N. Y. C. & H. R. R. Co.*, 11 *Hun*, 70 ; *Hoffman v. Gallaher*, 6 *Daly*, 42 ; *McCarron v. McNulty*, 4 *Gray* [Mass.] 139 ; *Brown v. Foster*, 113 *Mass.* 136 ; S. C., 18 *Am. R.* 436 ; *Gibson v. Cronage*, 39 *Mich.* 49 ; S. C., 33 *Am.* 351 ; note pp. 353, 354 ; *Galeski v. Clark*, 44 *Conn.* 218 ; *Russell v. Allerton*, 31 *Hun*, 307). Even Judge BRONSON concedes this to be the rule in *Buller v. Tucker* (34 *Wend.* 449).

III. This was not a contract to erect a building, but one to alter or repair a building already erected, and the true rule of damages was, what it would cost to make the building, as left by the plaintiffs, conform to the contract, plans and specifications (*Smith v. Brady*, 17 *N. Y.* 173-177). The rule as announced by the court of appeals, in *Kidd v. McCormick* (83 *N. Y.* 381), does not apply to the case of an alteration of, or repairs to, a building.

IV. The court erred in leaving it as a *question of fact* for the jury "to determine whether the twelve-inch wall was completed substantially as required by the terms and specifications of the contract." The specifications expressly required that the wall should have been built up to the top of the basement floor joists. Instead of which, it was only built up to the under side thereof, about twenty inches lower than was required by the specifications. This precise point was decided in *Glacius v. Black* (67 *N. Y.* 563-567). The same rule was laid down in *Smith v. Brady* (17 *N. Y.* 173. See also opinion of Judge COMSTOCK in this case, pages 186, 187).

V. All of the evidence given by the plaintiffs' witness, Hill, the superintendent of the architects employed by the defendant, as to changes made by his direction from the plans or specifications, should have been excluded under the contract (*Glacius v. Black*, 50 *N. Y.* 143, at p. 150 ; *Graham & Waterman New Trials*, 612-630). The admission of this testimony is cause for reversal (*Gulf C. & Santa Fe R'y Co. v. Levy*, 59 *Tex.* 542 ; 46 *Am.* 269).

VI. Chesley stated, on cross-examination, that the twelve-inch brick wall was not laid to the top of the base-

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ment floor joist, as required by the specifications. Plaintiffs' counsel then asked, "Why was not that done?" Defendant objected as incompetent. The question was allowed upon defendant's exception, and the witness answered: "Mr. Hill decided that that was the best way to do it." Defendant's motion to strike out this answer was denied, and an exception was taken. After stating that they had not complied with the specifications in this exceedingly important particular, plaintiffs were allowed to excuse their failure by showing that this same Mr. Hill, the employee of the architects, decided that it was the best way. Even if it be proper to allow plaintiffs to show why they deviated from the specifications, it is unquestionably incompetent to allow such testimony as this to stand upon the record, and the answer at least should have been stricken out. The answer might have been that *defendant* so directed.

Norwood & Coggeshell, attorneys, and *Carlisle Norwood, Jr.*, of counsel for respondents, cited authorities for the following propositions, urged by them:—I. The rule as to delay is, that where a contractor in a contract of this kind was prevented from completing his contract by changes from the specifications, or by any act of the other party, the contractor would be excused from performing at the contract time (*Dillon v. Masterson*, 42 *Super. Ct.* 176; *Doyle v. Halpin*, 33 *Ib.* 352; *Smith v. Gugerty*, 4 *Barb.* 614; *Fleming v. Gilbert*, 3 *John.* 528; *Farnham v. Ross*, 2 *Hall*, 167; *Stewart v. Keteltas*, 36 *N. Y.* 388; *Sinclair v. Talmadge*, 35 *Barb.* 602).

II. It is conclusively settled that the true test of the question whether the plaintiffs can recover upon a contract such as in the case at bar, is as follows: If the defects are of such a grave nature that they go to the whole purpose of the contract between the parties, plaintiffs can recover directly on contract; but if they are the defects of such a character that, though grave in themselves, they relate simply to particular parts of the *structure*.

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ture, they can (*Woodward v. Fuller*, 80 *N. Y.* 312 ; *Glacius v. Black*, 67 *Ib.* 563 ; 50 *Ib.* 145 ; *Johnston v. De Peyster*, 50 *Ib.* 666 ; *Hickman v. Pinckney*, 81 *Ib.* 211 ; *O'Sullivan v. Connor*, 8 *Week. Dig.* 61 ; *Phillip v. Gallant*, 62 *N. Y.* 256 ; *Weeks v. Little*, 47 *Super. Ct.* 1 ; aff'd, 89 *N. Y.* 566 ; *Smith v. Gugerty*, 4 *Barb.* 614). It is now well settled law that "where a builder has, in good faith, intended to comply with the contract, and has substantially complied with it, although they may be slight defects caused by inadvertence or intentional omissions, he may recover the contract price less the damage on account of such defects (*Woodward v. Fuller*, 80 *N. Y.* 312, 405).

III. Mr. Chesley, having testified, on cross-examination, that the twelve-inch wall was not laid on top of the basement floor joist, was asked, on the re-direct, why that was not done, which was objected to as incompetent, and having answered that Mr. Hill decided that was the best way to do it, defendant's counsel moved to strike out the answer, "on the ground that the decision of Mr. Hill cannot control the work." The court will recall the numerous cases cited (*ante*), holding that the good faith of the contractor, where he deviates from the contract, is one of the elements of his case. On the question of plaintiffs' good faith, the testimony was competent ; and as to the motion to strike out, the ground of the motion was wholly untenable ; plaintiffs never claimed that the decision of Mr. Hill was controlling. The defendant's counsel requested the jury to be instructed on this point, and the court allowed the request.

IV. The provision in the contract that "all work and finish shall be done to the satisfaction of the party of the first part," means should be to the *reasonable satisfaction of the owner* (*Addison Contr.* § 858 ; *Dalman v. King*, 4 *Bing. N. C.* 115), and this was, on the evidence, a question for the jury.

V. Plaintiffs insist that since this building was not built, or to speak more accurately, was not altered into a bachelor apartment house, for occupancy by the defend-

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ant ; but that on the contrary the purpose of the building was renting it to others ; that the only damages defendant could recover would be such as were occasioned by the actual loss of a tenant whom he might have procured but for the unreadiness of the building (*Wagner v. Corkhill*, 40 *Barb.* 175).

VI. The rule of damages invoked by defendant was clearly incorrect. He was not entitled to recover the cost of supplying omissions, or of making good defects, but could recover, if at all, the difference in value between the building as contracted for and as finished (*Kidd v. McCormick*, 83 *N. Y.* 391-397).

BY THE COURT.—O'GORMAN, J.—The plaintiffs were building contractors, doing business in the city of New York under the firm name of Morton & Chesley, and on or about February 4, 1882, they entered into a written agreement with the defendant—"to tear out, alter and rebuild" his premises known as 228-232 West Forty-second street, in this city, so that they should contain a complete first class apartment house of thirty-nine complete suits, in the same general style as to workmanship, &c., as that prevailing in "The Benedick" apartment house in Washington square. The work was to be done pursuant to certain specifications, "so far as the same were applicable thereto," and in accordance with detailed plans to be prepared by McKim, Mead & White, defendant's architects, and approved by the defendant. All work was to be done to the satisfaction of the defendant, and the whole was to be finished on July 1, 1882. The sum of \$45,000 was to be paid to plaintiffs for their work, in monthly installments, on certificates of the architects, and the balance was to be paid on the final performance of the contract, and delivery of the premises to the defendant as contracted for.

The work was not, in fact, finished until February 28, 1883, when the premises were delivered to the defendant.

The defendant Harrison resided in Vermont, and never

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gave personal attention to the building while in progress. It does not appear that he was ever there, and he left the protection of his interest in the matter wholly to two persons who acted as his agents therein, named respectively George W. Ellis, his attorney, and Percival W. Clement, who guaranteed the defendant's payments on the work, and entered into possession of the premises when completed and delivered up by the plaintiffs.

The defendant paid the plaintiffs \$8,800 during the progress of the work, and this action was brought to recover from him \$36,200, the balance claimed to be still due. The defense was, that the plaintiffs had failed to comply with important and substantial requirements of the contract ; that the time fixed in the contract for the completion of the work, July 1, 1882, was of the essence of the contract ; that in various other particulars the defendant, by reason of the negligence and unskillfulness of the plaintiffs as to material and substantial provisions of the contract, had been subjected to great loss and damage, amounting to \$40,000, for which sum the defendant made a counter-claim.

Of these charges against the plaintiffs, of failure to comply with their contract, but two seem to be important and entitled to consideration as affecting this appeal. One was, that the plaintiffs failed to build a twelve-inch brick wall from the foundation to the top of the iron cornice or basement floor joist, as required by the specifications. It is not denied that in this respect, the strict letter of the specifications was not complied with. The brick wall was built only to the *underside* of the girder, on which the floor beams of the basement floor rested. This, defendant claims, was a material and substantial violation of the contract, disentitling the plaintiffs to any recovery ; that its effect was to allow of a depression in the second, third, fourth, and fifth floors of the building, of from one to one and one-half inches ; and that this mischief would not have occurred if the brick wall had been built to the top of the basement floor joist, as

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required by the specifications. There was, on this subject, much conflict of testimony. Witnesses on the part of the plaintiffs testified that it would have been improper and unsafe to carry the twelve inch brick wall to the top of the basement floor joist ; that when the time came to do this work, it was found that to carry out exactly the terms of the contract, would have left the wall partition and everything resting on it in the five stories above, without any support, and would have jeopardized the whole building ; that the course actually adopted, was the proper course ; that the depression of the floors above was not more than usually occurred in houses thus altered from one purpose to another ; that it was not caused by the plan adopted, but was the result of shrinkage of the wood from over-heating of the building, for which said Clement was responsible, and of the great additional weight of many new partitions, erected on the upper floors, while in the house, in its former state, few partitions or rooms had existed.

The testimony of Mr. Hill, the superintendent employed by the architects, was substantially to this effect : He was continuously, from day to day, observing the work as it progressed, and it was his duty to see that the work was done according to the plans and specifications. It was he who directed this deviation from the terms of the specifications, without any consultation with his employers, because, in his opinion, it was necessary, and any other course would have caused the whole building to settle.

As tending to show acquiescence, or waiver of objection on the part of the defendant, the plaintiffs proved that both of the defendant's agents, Ellis and Clement, were frequent in their visits to the building, while it was in progress, and active in their criticism of the work ; that their constant presence had placed them in a position where knowledge of all that was done there was within their reach, and that they, or either of them, must have known of the manner in which the provision of the contract, as to the twelve-inch wall, was being carried out.

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The learned trial judge submitted to the jury, as a question of fact, whether the plaintiffs had substantially performed their contract, or whether there had been any material variation from it without the consent of the owner or his agents, and, in his charge, correctly instructed the jury as to the rule of law applicable to the case, and his charge was in harmony with the authorities cited by the learned counsel for the defendant. In my opinion, the question was properly submitted to the determination of the jury.

The other ground of defense is the plaintiffs' delay to complete the work on July 1, 1882, as required by the terms of the contract, whereas, the work was not in fact completed until February 28, 1883, seven months afterwards.

For this failure to comply with the terms of the agreement, plaintiffs offer this excuse. They say that they were embarrassed and delayed by changes of plan made by defendant's agents, Ellis and Clement.

The intention of the parties to the contract was, it appears, at first that an elevator should be put in the building, of the kind known as the "Whittier" elevator, and which was used in the "Benedick" apartment house. During the progress of the work, and about May 23, 1882, Clement determined to use an "Otis" elevator instead, and this change rendered necessary some other changes of the plans, as they were originally formed. It is in evidence that when the plaintiffs were informed of this change to the "Otis" elevator, they had already made a contract for an elevator with the "Whittier Machine Company," dated March 6, 1882, and some necessary delay occurred before plaintiffs could relieve themselves from their contract with the "Whittier Company." This, they, at last, succeeded in doing; and on June 29, 1882, they made a contract with "Otis Brothers."

Testimony was also given, on behalf of the plaintiffs, to show that the completion of the building had been further delayed by a change made by defendant's agents

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as to the kind of water-closets to be put in. The architects at first determined on the closet known as the "Bartholomew" as being that kind in use in the "Benedick." They afterwards changed it to the "Zane" closet. Then, Clement finally required that the "Hellyer" plan should be used, which involved putting in a line of pipe directly to the roof. This last choice, on the part of Clement, was not communicated to Chesley, one of the plaintiffs, until July 28, 1882, some days after the day fixed for the final completion of the building. It is also in evidence that these "Hellyer" closets as ordered, were not delivered to the plaintiffs until September 1882.

The learned trial judge submitted to the jury, with proper instructions, the question as to whether or not the plaintiffs had shown good reason or valid excuse for not completing the building at the day fixed by the contract, and whether, under all the circumstances of the case, they had completed it in reasonable time. No error, in my opinion, was committed therein. Both these questions were proper for the determination of the jury, and there was enough of evidence in the case to sustain their verdict.

The appellant's exception to the refusal of the trial judge to charge "that if they found that the contract has been substantially performed, they must allow the defendant such an amount as would be necessary to make the building conform to what the specifications required, was not well taken. The true rule of damages in the case at bar would be the difference in value between the house as it was in fact finished by the plaintiff, and as it would have been if he had accurately carried out the provisions of the contract (*Kidd v. McCormick*, 83 N. Y. 391). As a means of ascertaining that difference, and as matter of evidence tending to that end, the inquiry as to the actual cost of making the building conform to the specifications, would not be, in the case at bar, material or relevant. It is manifest, that to raise this twelve-inch brick wall, *now*, to the top of the basement floor joist, might involve the

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destruction of so much work already done, and the doing of so much work not originally contemplated by the parties, that such an inquiry could not give any reliable aid to the jury in ascertaining the difference in value, between the building, in a defective condition, and what would have been its value if no defect had existed.

This case seems to have been tried with care, and an exhaustive examination of all the facts which could give any light to the jury. The jury were also allowed to visit the building in question, and I see no reason to interfere with their verdict.

The judgment appealed from should be affirmed, with costs; and the order appealed from should also be affirmed, with \$10 costs.

SEDGWICK, Ch. J., concurred.

THE METHODIST EPISCOPAL CHURCH HOME v.
WILLIAM N. THOMPSON.

Real estate—contract for purchase of—action by vendee to recover deposit, &c.—what defects in title will sustain.

When a party seeks to disaffirm a contract for the purchase of real estate and to recover the deposit made on account of the price, etc., on the ground of a defective title, he must satisfy the court that the title is bad before he can recover. It is not enough to merely show that it is doubtful.

Accordingly, where plaintiff, the vendee, refused to take title on the ground that there was an outstanding claim of title, under which certain persons claimed title to the property in question, but the undisputed evidence on the trial showed that defendant, the vendor, and his grantors, had been in actual possession for about thirty years under a claim of title beginning in 1825, and there was nothing tending to show possession in any other person, or that any third person had a valid claim or lien on the land.

Held, that plaintiff could not recover the deposit made by him on account of the purchase price. The facts show a clear adverse possession under the Code for over twenty years, which makes a title that a purchaser may not refuse.

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Before SEDGWICK, Cn. J., and TRUAX, J.

Decided July 23, 1885.

Application by the plaintiff for judgment, on a verdict for the plaintiff, ordered by the trial court, subject to the opinion of the general term.

Action to recover \$1,500, deposited by plaintiff as vendee, on signing a contract for the purchase and sale of real estate, also \$608.33 expenses and counsel fee in examining title.

The plaintiff, a charitable corporation, desiring to purchase property on which to build, entered into a contract with this defendant, whereby defendant agreed to sell, and plaintiff to purchase, six lots of land on the north-west corner of Eighty-eighth street and Fourth avenue, in the city of New York, one hundred and thirty feet on Eighty-eighth street by half the block in depth, for the sum of \$45,000, whereof \$1,500 was deposited with the defendant on the execution of the agreement, and the balance, viz., \$43,500 was to be paid on the delivery of the deed, which deed was to contain full covenants and warranty, and the premises to be free from all incumbrance. Plaintiff employed counsel to examine the title, and upon such examination it was found that there was another outstanding chain of title claimed adverse to it, as follows: On August 30, 1819, one Elemuel Sheldon filed and recorded in the register's office of New York county, a deed from one Patrick McKay and wife, to said Elemuel Sheldon, conveying with other property, the premises in question, and annexed to said deed and recorded therewith was a map showing said premises and entitled, "A map of a piece of land situate in the ninth ward of the city of New York, on the Harlem Height, the property of Patrick McKay, Esq., containing seven acres and three roods, fifteen perches, surveyed New York, October 1, 1818, by Adolphus Loss, surveyor." After various mesne conveyances, there was also recorded, on January 16, 1833, a deed

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of same premises to Joseph Parks, said Joseph Parks died and left a will, which was duly admitted to probate March 1, 1837, whereby said testator devised his estate to his executors, in trust, and on February 19, 1868, by an order or decree of the supreme court, new trustees were appointed. Subsequently an action of ejectment was brought in the United States circuit court for the southern district of New York, by said heirs, against the defendant for the recovery of the possession of the premises in question and adjoining property, and such action is now pending.

The defendant tendered a good and sufficient deed of the premises, which the plaintiff refused to accept, objecting to the title because of the claim of ownership by persons representing themselves to be the heirs of said Parks. The defendant asserted that the title was good and sufficient, tendered affidavits of adverse possession for twenty years and more, and offered to put the plaintiff in possession.

Further facts appear in the opinion.

Kelly & MacRae, attorneys, and *William H. Arnoux* and *W. F. MacRae*, of counsel for plaintiff :—I. Plaintiff is entitled to a good and marketable title, one that is indefeasible and unincumbered, and the defendant's title is not such a one (*Burwell v. Jackson*, 9 N. Y. 535 ; *Fletcher v. Button*, 4 *Ib.* 396 ; *Story v. Conger*, 36 *Ib.* 673 ; *Delevan v. Duncan*, 49 *Ib.* 485 ; *Piser v. Lockwood*, 30 *Hun*, 6 ; *Post v. Bernheimer*, 31 *Ib.* 247 ; *Chamberlain v. Brady*, 49 *Super. Ct.* 484 ; *Atkinson Marketable Titles*, 2, 3, 379 ; *Bostwick v. Beach*, 31 *Hun*, 343). If there is any defect, the purchaser may refuse, however remote the probability of his ever being incommoded thereby (*Brooklyn Park Com. v. Armstrong*, 45 N. Y. 234). The court will not compel a purchaser to accept a title which is so doubtful that it may expose him to litigation, though the court may believe it to be good (*Post v. Bernheimer*, 31 *Hun*, 247). A purchaser cannot be compelled to take a title

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depending upon adverse possession and parol proof to support it, unless in a case beyond all reasonable doubt (*Mott v. Mott*, 68 N. Y. 246 ; *Hartley v. James*, 50 *Ib.* 38). It is not enough that the vendor has an equitable title which the purchaser may acquire together with the possession and use of the premises (*Fletcher v. Button*, 4 N. Y. 396 ; See also, *King v. Knapp*, 59 *Ib.* 462). To constitute a cloud upon title it is sufficient that there be a deed valid upon its face, accompanied with a chain of title, under such circumstances that a court of equity can see that the deed is likely to work mischief (*Fonda v. Sage*, 48 N. Y. 173). Anything is a cloud upon a title which is calculated to cast doubt or suspicion upon the title, or seriously to embarrass the owner either in maintaining his rights or disposing of the property (*Ward v. Dewey*, 16 N. Y. 519). A purchaser is entitled to a marketable title. As a general rule a title which is open to judicial doubt is not a marketable title. A purchaser is not to take a property which he can only acquire in possession by litigation and judicial decision, nor one the possession of which he must thus defend (*Shriver v. Shriver*, 86 N. Y. 575).

II. If plaintiff "was not bound to accept" the title tendered by defendant, and clearly it was not, then plaintiff is entitled to recover back the money paid under the contract, as upon a consideration that has failed (*Bruner v. Meigs*, 64 N. Y. 515).

III. "The right to a good title is not a right growing out of the agreement between the parties, but given by the law—the purchaser being entitled to have a clear title shown, not merely on the ground that it is stipulated for by the agreement, but on the principle growing out of the nature of the contract, that, as the purchaser parts with good money, the vendor shall give in return an estate with a clear title" (*Atkinson Marketable Titles*, 379). "The distinction is not between a title which is absolutely good or bad, but between a title which the court considers so clear that it will enforce its acceptance by a purchaser, and one which the court will not go so

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far as to declare it a bad title, but only that it is subject to so much doubt that a purchaser ought not to be compelled to accept it. In short, whatever may be the private opinion of the court as to the goodness of the title, yet if there be a reasonable doubt, either as to matter of law or fact, a purchaser will not be compelled to take" (*Ib.* 2, 3).

John W. Pirsson, attorney, and *John E. Parsons* and *John A. Beall*, of counsel for defendant :—I. The plaintiff has utterly failed to show title in the Parks heirs, or that there ever was any possession under the alleged claim.

II. In order to recover, the plaintiff must show that the title is bad, or at least that it is really doubtful. It may be conceded that the general rule in equity is that a purchaser will not be compelled to take a doubtful title ; but then the doubt must be shown to be real, or, in other words, substantial. This case is, however, very different ; the purchaser is the actor ; it seeks to disaffirm and rescind an executory contract, and to recover the deposit paid on the sale. Here it is the duty of the plaintiff to satisfy the court that the title is *absolutely bad*. A merely doubtful title will not do (*O'Reilly v. King*, 28 *How. Pr.* 408 ; 21 *Mich.* 351). "The court must govern itself by a moral certainty, for it is impossible in the nature of things that there should be a mathematical certainty of a good title" (Lord HARDWICKE, 2 *Atk.* 20). Unless plaintiff's objection to the title is sustained, it cannot recover back its part payment of purchase money (*Page v. McDonnell*, 55 *N. Y.* 299 ; *Lawrence v. Miller*, 86 *Ib.* 131).

III. If the defendant had brought an action for specific performance upon the facts proved, he would have been entitled to a decree. (a) The title by adverse possession alone is sufficient for such a decree (*Murray v. Harway*, 56 *N. Y.* 337 ; *Shriver v. Shriver*, 86 *Ib.* 575 ; *Sherman v. Kane*, 86 *Ib.* 57 ; *Seymour v. Delancey*, *Hopk. Ch.* 436 ; *Pratt v. Eby*, 67 *Pa. St.* 396). (b) The objection made to

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the title is not sufficient to excuse the plaintiff from specific performance. There must be at least a reasonable doubt as to the title—such as affects its value, and would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable. A defect in the record title may, under certain circumstances, furnish a defense to the purchaser. But there is no inflexible rule that a vendor must furnish a perfect record or paper title. It has frequently been held that defects in the record or paper title may be cured or removed by parol evidence (*Hellriegel v. Manning*, 97 N. Y. 60). There must be some substantial debatable grounds on which the doubts can be justified (*Vreeland v. Blauvelt*, 23 N. J. Eq. 403). The doubt must be such as would produce a *bona fide* hesitation on the mind of the chancellor (*Kastenbador v. Spotts*, 80 Pa. St. 430). If the doubts arise upon a question connected with the general law, the court is to judge whether the general law on the point is or is not settled (*Pyrke v. Waddingham*, 10 Hare, 1). (c) The plaintiff's objection in this case was that the heirs of Joseph Parks claimed to be the owners of the property under a chain of title beginning with a deed by Patrick McKay, made in 1818, and ending in a deed to Parks in 1830. It does not go back to the original owner, the sovereign, and it does not appear that there was any possession under such claimed title at any time. The true test of the effect to be given to this objection is, could the parties alleging such adverse title in ejectment, or other appropriate action against the defendant, recover the premises. The defendant's chain of title is perfect, and the actual possession by him and his predecessors is vastly greater than is necessary (§§ 365, 367, 369, 370, 371 and 372 *Code Civ. Proc.*; 3 *Washburn Real Prop.* 144, 114; *Ottinger v. Strausburger*, 33 Hun, 466; *Woolsey v. Morss*, 19 Ib. 278).

There can be no question that all persons claiming as the heirs of Parks, are absolutely barred by the statute. Joseph Parks died about March 1, 1837. Where an adverse possession begins to run in the lifetime of the

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ancestor, it will continue to run against the heir, notwithstanding any existing disability on the part of the latter, when the right accrues to him or her (*Jackson v. Moore*, 13 *Johns*. 513 ; *Bradstreet v. Clarke*, 12 *Wend*. 603 ; *Peck v. Randall*, 1 *Johns*, 176 ; *Fleming v. Griswold*, 3 *Hill*, 85 . *Becker v. Van Valkenburgh*, 29 *Barb*. 319).

IV. The fact that the purchaser may be exposed to utterly groundless litigation, will not justify him in refusing to take title, if it is clear that such litigation cannot be successfully prosecuted (*Kelso v. Lorillard*, 85 *N. Y.* 177 ; *Belmont v. O'Brien*, 12 *Ib.* 394 ; *Murray v. Harway*, 56 *Ib.* 337 ; *Chase v. Chase*, 95 *Ib.* 373 ; *Brooklyn Park Comm. v. Armstrong*, 45 *Ib.* 234 ; *Post v. Bernheimer*, 31 *Hun*, 247).

V. The defendant tendered plaintiff a good title in fee simple, with possession, which it was bound to accept, and upon which specific performance would be decreed. The record claim of title is without a flaw, beginning with the grants of the colonial governors to the town of Harlem, and coming down to the defendant through some sixteen mesne conveyances, beginning with the commissioner's deed in 1825, and two sales under foreclosure. (b) The title by possession alone is such that specific performance would be decreed. Proof by affidavit of such possession admittedly sufficient was tendered. And upon the trial that possession was clearly proved for upwards of 45 years. Defendant was not bound under the contract to give a marketable title, but if the judgment of the court is that the title is good, it is marketable (*Romilly v. James*, 6 *Taunt.* 263 ; *Wrigley v. Sykes*, 21 *Beav.* 337 ; *Cruikshank v. Bronson*, *Sup. Ct.* unreported ; *Belmont v. O'Brien*, *supra* ; *Leggett v. Mutual L. I. Co.*, 53 *N. Y.* 394). The contract was to give "a proper deed containing a general warranty and the usual full covenants for the conveying and assuring to it or them, the fee simple of the said premises, free from all incumbrances." The title means the legal estate in fee, free and clear of all

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valid claims, liens, and incumbrances (*Jones v. Gardner*, 10 *Johns.* 265).

BY THE COURT.—TRUAX, J.—The parties hereto entered into a contract in writing for the purchase by the plaintiff from the defendant, and for the sale by the latter to the former, of a plot of land situate in the city of New York. On the day fixed for taking title, the defendant tendered to the plaintiff, and the plaintiff refused to take the full covenant warranty deed required by the contract of sale, and demanded from the defendant the money paid on account of the purchase price of the property, and the expenses incurred in searching the title. The defendant refused to accede to this demand, and thereupon plaintiff brought this action to recover the moneys so paid, and the expenses so incurred as aforesaid.

This court has decided that when a party seeks to ~~dis-~~affirm and rescind a contract of sale and to recover ~~back~~ the deposit paid on account of the purchase price ~~on the~~ ground of a defective title, he must do more than merely show that the title is doubtful, he must satisfy the court that the title is bad, before he can recover (*O'Reilly v. King*, 28 *How.* 408).

The ground of plaintiff's refusal to take title was ~~that~~ the defendant's title to the property was not a good ~~one~~, because of a claim of ownership in certain persons ~~who~~ represented themselves to be the heirs of one Joseph Parks; but the undisputed evidence shows that ~~the~~ defendant and his grantors have been in possession of ~~the~~ property for about thirty years under a claim of ~~title~~ beginning in 1825. There is no testimony opposed to ~~this~~ that tends to show possession in any person other ~~than~~ the defendant or his grantors, and there is no evidence that any third person has any valid claim or lien on ~~the~~ property. On the evidence now before the court, a ~~trial~~ judge would be bound to direct a jury to find that ~~the~~ defendant was the owner of the property. In the words of *Shriver v. Shriver* (86 *N. Y.* 575), the facts of the ~~case~~

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make out a continuous, uninterrupted, actual possession, beginning with an entry under claim of exclusive title, founded on a written instrument and kept up for over twenty years (*Code*, § 369). A clear adverse possession for that length of time makes a title which a purchaser may not refuse to take (*Ib.*)

The verdict of the jury is set aside, and judgment is ordered for defendant, dismissing the complaint, with costs.

SEDGWICK, Ch. J., concurred.

WILLIAM H. RUTTY, APPELLANT, v. AUGUSTINE
E. PERSON, ET AL., RESPONDENTS.

Equity—Account stated, when opened and set aside—Costs, to whom awarded.

An account which has been settled and stated, will be opened in equity only on clear proof that the settlement was induced by fraud, mistake or manifest error, and never where it appears that at the time of the settlement, both parties had full knowledge of the facts in relation to the charges, and after mutual concessions, agreed that the account should be a stated account.

In an action to open and set aside an account stated, and for an accounting as to the whole period of the business dealings of the parties, where plaintiff fails in setting aside the account, but is found entitled to an accounting as to transactions subsequent thereto, and judgment for a certain sum, and it does not appear that before the trial, defendants offered to allow judgment to be taken for that amount, in the exercise of a sound discretion, costs should be awarded to plaintiff.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided July 28, 1885.

Appeal by the plaintiff from a judgment entered on report of a referee.

Action to re-open and set aside certain statements of account between partners, and for an accounting.

Opinion of the Court, by INGRAHAM, J.

The plaintiff by his action, sought a judgment that all the statements and accounts theretofore rendered by the defendants, be declared opened, unadjusted, and unsettled, and that the defendants account in respect to all the business in the complaint mentioned, from the commencement thereof to its close, a period of several years. This relief was sought on the ground that the statements made false representations of the facts respecting the dealings; that the plaintiff assumed them to be correct, and had no knowledge to the contrary, or means of verifying them accurately. In these respects plaintiff failed, but the referee found that he was entitled to an accounting as to a sum of money left with defendants as security for plaintiff's share of the debts, and to a judgment thereon for \$507.42. The referee awarded costs to the defendants.

Further facts appear in the opinion.

John E. Eustis and Eugene H. Pomeroy, for appellant.

Kobbé Brothers and Stephen P. Nash, for respondents.

BY THE COURT.—INGRAHAM, J.—By the agreement under which the business carried on by the parties, and known as the glove business, was transacted, the defendants were to be allowed a selling and guaranty commission of five per cent., and were to pay clerk hire and traveling expenses in the United States. Plaintiff was to be allowed five hundred dollars in gold for each voyage he should make to Europe, and any profit or loss remaining, was to be equally divided between the plaintiff and the firm composed of the defendants. This, I think constituted a copartnership between the parties to the agreement.

The accounts of the business were, from time to time, delivered to and received and retained by plaintiff without objection. On January 14, 1882, when the copartnership was finally terminated, the defendants delivered to plaintiff a general account of the transactions of the copartnership, containing the balances of the accounts formerly rendered, and an account of the sales and expenses from

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the date of the last account, a statement of the amount due plaintiff for his share of the profits of the copartnership, and the amount due from plaintiff to the defendants for the purchase by plaintiff of the balance of the copartnership stock. After the receipt of the account, plaintiff by a letter of the same date, acknowledged its receipt and accepted the account as a final settlement. Up to this time plaintiff had not been deprived of any right to examine the books of the copartnership, nor is there any evidence to show that he was induced to accept the account by any representation or inducement of the defendants.

On these facts the referee found as conclusion of law, that on January 14, 1882, the accounts between the plaintiff and the defendants were stated and adjusted and became settled accounts. In this the referee was clearly right, and I do not understand it to have been disputed by the plaintiff. The plaintiff, however, asked to open the accounts so settled, on the ground that several distinct sets of charges in the accounts rendered for money alleged to have been paid by defendants, were false and excessive. There are four series of charges that are objected to by plaintiff. Only two of these were relied upon on this appeal, namely; the charges for custom house expenses and the charges for marine insurance. As to the custom house charges, the referee found, as a fact, that prior to October, 1880, it was agreed between the parties that the charge to be made by defendants to said business, for entering goods at the custom house, including the expenses of their removal to defendants store or place of business, should be five dollars per case, and in October, 1880, it was agreed between the parties that such charge should be three and one-half dollars per case from October 1, and that the prior charges therefor should stand. In June 1881, it was further agreed that such charges thereafter should be three and one-half dollars per case for the first case of any shipment and one dollar per case for every additional case of such shipment. After an examination

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of the testimony, we are of the opinion that this finding was sustained by the evidence. It therefore appears that the custom house charges complained of, were adjusted in 1880, and that in consideration of the reduction for future charges, it was agreed that the charges before made should stand, and this after plaintiff had discovered that the charge was higher than that made by others in the same business.

As to the marine insurance, it appears that in November, 1880, the letter (Exhibit 40) was delivered to plaintiff. In that letter it was stated that the amount that had been paid for marine insurance was five-eighths of one per cent. and in some instances as low as one-half of one per cent. With this information before him plaintiff saw fit to settle his account with the defendants in which the further charge for marine insurance complained of, was made.

The fact that the information contained in the letter was true, and that he had been charged more than was actually paid, would not justify the court in opening the accounts. Courts of equity have always been reluctant to open accounts that have been settled and become stated accounts, and such settlements have only been opened on clear proof that the settlement was induced by fraud, mistake or manifest error, and never where it appeared that at the time of the settlement of the accounts both parties had full knowledge of the facts in relation to the charges, and after mutual concessions had agreed that the account should be a stated account.

In *Harley v. Eleventh Ward Bank* (76 N. Y. 618), the court held that an account stated can only be opened where the party objecting shows clearly that he has been misled by fraud, mistake or manifest error, and from the facts found by the referee, it cannot be said that the plaintiff in this case, when he assented to the accounts, was so misled. Having come to this conclusion, it is evident that the refusal to compel the production of the books in accordance with the stipulation was not error. The parties had stipulated that such books should be produced before the

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referee, as the course of the hearing might render material, with the same effect as if produced on subpoena. When it appeared, however, that the settlement between the parties was made with full knowledge of the facts, or the charges complained of were made under an express agreement between the parties that the amount charged should be the proper charge for the services rendered, it is evident that the books or the contents of the books were entirely immaterial, and even if they had shown the charge, as made in the account, was in excess of the amount actually paid by the defendants, it would not have changed the result.

None of the exceptions to the admission or rejection of evidence were insisted on, on the argument, and so far as appears no error was committed by the referee that requires a reversal of the judgment.

I think, however, the referee erred in awarding the defendant costs against plaintiff. It is true plaintiff failed to have the accounts opened, but it appeared on the trial that plaintiff was entitled to an accounting, and a judgment against the defendants for \$507.42. Defendant did not, before the trial, offer to allow plaintiff to take judgment for that amount, and under all the circumstances, I think the referee should have awarded costs to the plaintiff, and not to the defendant.

The judgment should, therefore, be modified by awarding plaintiff judgment for the sum of \$507.42, with costs, and as so modified, affirmed without costs to either party on this appeal.

SEDGWICK, Ch. J., and O'GORMAN, J., concurred.

Statement of the Case.

THE BANK OF MONTREAL, APPELLANT, v. CARL L. RECKNAGLE, ET AL., RESPONDENTS.

Letter of credit, proposal for, telegram as to, to be construed together—condition precedent, construction as to—draft to be drawn against bills of lading of particular article—non-liability to reimburse if the bills of lading do not purport to be of that article.

Defendants, on December 1, 1881, requested plaintiff's agent to telegraph authority to Vogel & Co., Hong Kong, at six months, to draw for their account against consular invoice and full set of bills of lading of 2,500 bales of manila hemp, per "Robinson." Accordingly, plaintiff's agent, on the same day, telegraphed Vogel & Co., at Hong Kong, "Credit 608 six months, issued Recknagel . . . documents 2,500 bales manila hemp, per Robinson . . . Bank of Montreal." The next day, a letter of credit, dated December 1, 1881, was made out by plaintiff's agents, authorizing Vogel & Co., of Hong Kong, to value on plaintiff at London, against goods shipped per Robinson, for a specified sum, to be used as they might direct, for invoice cost of 2,500 bales of manila hemp, at four pounds per bale, on a basis of eight shillings sterling freight filled up in the bill of lading. The letter of credit required advices of the bills to be given in original and duplicate, and accompanied by bill of lading filled up to order of agents of Bank of Montreal, New York, with abstract of invoice indorsed thereon for the property shipped as above. A note at the foot required the invoice of shipments to be accompanied by U. S. consul's certificate. Defendants, by letter dated December 1, 1881, agreed "to provide for all bills which shall be drawn and accepted under" the letter of credit, "by payment of the amount thereof to you in New York." The letter of credit was sent by mail to Vogel & Co. Before receiving the letter of credit, Vogel & Co. drew their bills on plaintiff at London. Each draft stated on its face that it was drawn against bales of manila hemp, was accompanied by bills of lading for *bales of merchandise*, and a letter of advice describing the shipment referred to in the draft as of "bales of hemp." On each bill of lading was indorsed what were called abstracts of invoices describing the shipment as of manila hemp. On these documents plaintiff's agent in London honored the three drafts. The shipment represented by one of the bills of lading against which one of the drafts was drawn, was in fact of a requisite number of bales of manila hemp. As to this draft, no question arose. The shipments represented by the other bills of lading were in fact of matting. The questions in the case arose as to the drafts drawn against these latter bills

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lading. It appeared that the abstract of invoices endorsed on the bills of lading was made by Vogel & Co., after the bills had been signed and delivered to them by the captain and without his knowledge or consent. It also appeared that the size, outward appearance and packing of matting, and of manila, were entirely dissimilar, and the two were easily distinguishable.

Held, that defendants' request, the telegram, and the letter of credit must all be considered together to know the agreement. So considering them, the agreement called, among other things, for bills of lading of manila hemp, as a condition precedent to the payment of bills drawn under the agreement, and the responsibility of defendants rested solely upon whether this condition precedent had been complied with; *That* the nature of the relation between Vogel & Co. and the defendants, or of the interest of defendants in the hemp, is therefore immaterial; so, also, is the fact that Vogel & Co. committed the fraud of shipping matting instead of hemp, the agreement providing in substance for defendants' protection against the acts of their agents, if Vogel & Co. were agents; *That* it followed, since the bills of lading, against which the two drafts in question were drawn, were simply of "bales of merchandise," and since the shipments represented by such bills of lading were in fact of matting and not manila hemp, whereby a loss ensued, that plaintiff was not entitled to be reimbursed by defendants the money paid on such drafts.

Before SEDGWICK, Ch. J., and VAN VORST, J.

Decided December 7, 1885.

Appeal by plaintiff from judgment entered upon findings, &c., of judge at special term.

The complaint demanded judgment that defendants pay to plaintiff the amount of two acceptances, made by plaintiff, under a letter of credit issued by plaintiff at request of defendants, and paid by plaintiff, the defendants having promised to indemnify the plaintiff; and that a pledge of certain certificates of shares, as security for defendants' performances of their promise, should be enforced by sale, &c.

Further facts appear in the opinion.

Lord, Day & Lord, attorneys, and *George De Forest Lord*, of counsel for appellant, argued:—I. The telegram

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and the letter of credit are in no sense separate contracts. Circumstances, however, may make it necessary to consider what the respective rights and obligations of the plaintiff and defendants are with reference to each of these instruments taken by itself. 1. The plaintiff and defendants clearly intended only to make one contract between themselves. The existence and employment of these two instruments in these transactions, must therefore produce the following effects upon the mutual relations between the parties: (a) If the conditions on which Vogel's authority to draw, as stated in the telegram, were less stringent than those stated in the letter of credit, holders of drafts so drawn would be entitled to acceptance, notwithstanding the more stringent terms of the letter of credit might not have been complied with; and the defendants would be bound for reimbursement to the plaintiff. (b) But if the terms of the letter of credit were less stringent than those of the telegram, the plaintiff would still be bound, as between itself and the defendants, to accept all drafts which should comply with these less stringent terms, even though the holders of the drafts might not have complied with the more stringent requirements of the telegram. These distinctions are not fanciful, and may become very important in considering this case. In order that the court may easily determine the effect of them, the following differences between the two instruments are pointed out. 1. The telegram gives authority to draw against "documents 2,500 bales manila hemp." This is the only condition which it imposes. 2. The letter of credit authorizes Vogel & Co. to draw "against goods shipped per Robinson. . . for any sum or sums not exceeding the aggregate £10,000, to be used as they (*i. e.*, Vogel & Co.,) may direct for invoice cost of 2,500 bales manila hemp, &c." As the drafts in question were actually drawn and negotiated before the letter of credit reached China, the discussion should properly turn first upon the effect of the telegram.

II. The construction of the two instruments should

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lean, if anything, towards protecting persons who have honestly parted with their money upon the faith of the instruments; and if anything in them is doubtful or ambiguous, parties acting in reliance upon them should have the benefit of any reasonable interpretation of which they are capable. A letter of credit bears a strong analogy to a guaranty, and in making the following citations anything said concerning guaranties is considered as applying *a fortiori* to letters of credit: *Douglas v. Reynolds*, 7 *Pet.* 123 (1833); *Lawrence v. McCalmont*, 2 *How. Sup. Ct.* 449 (1844); *Drummond v. Prestman*, 12 *Wheat.* 515 (1827); *Gates v. McKee*, 13 *N. Y.* 235 (1855); *White's Bk. v. Myles*, 73 *N. Y.* 341 (1878); *Gelpcke v. Quentell*, 59 *Barb.* 264 (1871); *Drummond v. Prestman*, 12 *Wheat.* 515 (1827); *Bell v. Bruen*, 1 *How. Sup. Ct.* 169 (1843); *Dobbin v. Bradley*, 17 *Wend.* 422. In applying to these two instruments the rules of construction thus laid down, the court should ask itself the following questions, viz.: 1. Considering the nature of the transaction in hand, and also the conditions and circumstances under which it was to be carried out, what must the parties be supposed to have intended by the language used in these instruments? 2. Is the language, so interpreted, fairly capable of the meaning evidently put upon it (a) by the persons who purchased the drafts in China, and (b) by the plaintiff when it accepted the drafts in London? If it is, then the parties who have advanced their money on the faith of that meaning should be protected.

III. The language of the telegram fully justified parties in China in purchasing these drafts upon the documents presented by Vogel & Co., therefore the plaintiff was bound to accept the drafts, and the defendants were bound to reimburse plaintiff. The documents so presented came fairly and reasonably within the description contained in the telegram, viz.: "documents 2,500 bales manila hemp." Purchasers of drafts were entitled to have them honored. The documents upon which these

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drafts were actually negotiated are all before the court, and do reasonably come within that description. They were as follows, viz.: bills of lading for certain "merchandise"—the marks and numbers of bales of which are duly specified; invoices signed by Vogel & Co.; letters of advice, also signed by Vogel & Co. No other "documents" ever accompany drafts drawn under such credits. In these Vogel & Co., in every paper emanating from them, viz.: invoices, drafts, and letters of advice, have unequivocally stated the property to be "manila hemp." The only papers in which it is not thus specifically described are the bills of lading signed by the shipmaster. The defendants' contention here is, that because the bills of lading only acknowledged the receipt of "merchandise," without stating that such merchandise was manila hemp—therefore these documents were not "documents 2,500 bales manila hemp" within any fair and reasonable meaning of the telegram. This contention is not sound if the court considers that the parties intended or expected the drafts to be negotiated on the faith of Vogel's statements as to the nature of the property shipped. They have again and again declared it to be manila hemp. It involves the assumption that both parties to this credit transaction—the defendants and the plaintiff—intended to rely, in the most important matter connected with it, not upon the statement of Vogel & Co., whom they both knew, and whom the defendants were entrusting with the use of the money, but only upon the statements of the master of the ship "R. Robinson," whom they probably had neither of them heard of before. Vogel & Co. had purchased and shipped the property on Recknagle's behalf—and they distinctly declared it to be manila hemp. The shipmaster described the property in property in general terms which in no way contradicted this statement. Why should not such statements as to the nature of the shipments be satisfactory? Indeed, when these documents are all taken together—each filling out and explaining the other—would not any merchant or

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banker reasonably and fairly consider them to be "documents" for 2,020 bales manila hemp? Everybody to whom they have been presented has so considered them—the purchasers of the drafts in China—the bank in London who accepted the drafts—and the defendants in New York, who receipted for them and entered the property as manila hemp. The improbability that the parties intended that the master's statement as to the nature of the shipments should be alone, or even chiefly, relied on by purchasers of the drafts, is increased when it is considered (a) that it could not be certain that the master would be willing to state in a bill of lading the character of the merchandise, and (b) that whatever statement he might make would necessarily be so qualified and restricted as to furnish no real protection to either the plaintiff or defendants. It can hardly be presumed that the plaintiff and defendants intended to insist—as a condition to the negotiation of those drafts—upon the giving of a bill of lading in a form which any prudent shipmaster would refuse to give, at least without so guarding it that no practical benefit would be obtained from it. The following citations from authorities are pertinent here: *Leggett on Bills Lading*, 13; 1 *Parsons on Shipping*, 197; *Nelson v. Stephenson*, 5 *Duer*, 549. Suppose, therefore, in the case before the court the master had refused—as in fact he may have done—to commit himself as to the nature of the property entrusted to him by any description of the contents of the bales, he would have been acting quite within his rights, as is well known to all the commercial world. Can the defendants, therefore, reasonably insist that persons dealing with Vogel on the faith of that telegram should have known that they were only to take the drafts when accompanied by bills of lading in a form which the master might refuse to sign, and that they were not to take them if the bills of lading were in the only form which Vogel & Co. could properly demand from the ship? But even if the master had described this property not as "merchandise" but as

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"manila hemp," he would only have done so in a way which would have furnished no protection to the defendants; for he would surely have added qualifying words such as "said to be, &c.," or "weight and contents unknown"; the effect of which would be to deprive the previous description of all value. The latter expression appears, in fact, in these very bills of lading. And where such words appear neither the master nor the ship are bound by such a description (*Lebeau v. Gen. Steam Nav. Co.*, 42 *L. J. (N. S.) C. P.* 1; *Jessell v. Bath*, 36 *L. J. (N. S.) Exch.* 149). If the master in this case had used the expression "said to be manila hemp," even the defendants could not have questioned the regularity of the bills of lading. Yet that would only have been a repetition by him of Vogel's statements to the same effect. But if intending purchasers of these drafts would be authorized to act upon such a repetition of Vogel's statements coming through a third party, why should they not act upon Vogel's direct statements to the same effect as contained in all the other documents? Again, therefore, it is insisted that any interpretation of this telegram which should make such a valueless statement a condition precedent to the negotiation of drafts drawn under it is unreasonable and absurd (*Lebeau v. Gen. Steam Nav. Co.*, 42 *L. J. N. S. C. P.* 1, 1872; *Clark v. Barnwell*, 12 *How. Sup. Ct.* 272).

IV. But the parties who purchased these drafts in China upon these "documents" would be entitled to hold the bank and Recknagle for their payment—not only because such documents might fairly be considered such as the bank and Recknagle intended to have them rely upon, but also because Vogel & Co., being Recknagle's agents for the purchase and shipment of the hemp, their statements in that regard would be blinding upon Recknagle. This would be apparent, even to persons who might see only the telegram. But the letter of credit—by which especially the mutual relations between the plaintiffs and defendants are to be governed—is still more

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explicit. Assuming, therefore, that Vogel & Co. were Racknagle's agents to purchase and ship these goods, their statements as to what they had purchased and shipped bind the defendants (*Merchants' Bk v. Griswold*, 72 *N. Y.* 472, 1878; *North River Bk. v. Aymar*, 3 *Hill*, 262, 1842; *Farmers' & Mechs. Bk. v. Butchers' & Dr. Bk.*, 16 *N. Y.* 125, 1857; *Griswold v. Haven*, 25 *N. Y.* 595, 1862).

V. But assuming that the relations between the plaintiff and Recknagle & Co., except so far as they may be fixed by obligations which both may have assumed to strangers, under the telegram, are contained in the letter of credit alone, the acceptance of these drafts is fully justified. This has been sufficiently discussed. The written words in the letter of credit "for invoice cost of 2,500 bales of manila hemp" are not attached to, and form no part of, Vogel & Co.'s authority to draw, but only restrict their use of the money. They were authorized to draw against goods, but were charged to use the money in purchasing hemp. That is all. The defendant seeks to interpret this letter of credit as though it had read "to draw against 2,500 bales manila hemp, etc." The instrument itself reads otherwise.

VI. 1. Everything which the letter of credit imposes as a condition of acceptance has been complied with. With the single exception that the property was described as "merchandise" instead of "manila hemp" in the bills of lading, the defendants even cannot claim a deviation from the strictest regularity. It is respectfully insisted that this was no irregularity. 2. But the case of the bank under the letter of credit is quite as strong in another light. They were bound only to the exercise of proper mercantile caution in accepting these bills. If to a careful business man the documents which accompanied these drafts might fairly be considered to represent 2,020 bales manila hemp, then the bank was authorized to accept, and the defendants must bear the consequences of their agent's fraud. It appears in this case that even the defendants themselves, when

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they took these very bills of lading from plaintiffs' agents in New York, receipted for them as 2,020 bales manila hemp. Why should they now complain of the plaintiff for doing the same thing? 3. Again, the plaintiff's position under the letter of credit was one of great responsibility, involving not only its own credit, but that of Vogel & Co., and of the defendants here. If, therefore, there was any ambiguity, either in the letter of credit or in the documents presented, and the plaintiff has acted honestly and reasonably, in view of all the circumstances, it should be protected. Who will say, on reading the letter of credit, that drafts drawn against "merchandise" were not regular, under an authority to draw against "goods." So also, who would venture to say that bills of lading for "merchandise" accompanied by other genuine documents stating it to be manila hemp, did not represent such hemp within the legitimate meaning of the letter of credit. As matter of fact, one of those bills of lading did represent hemp. Suppose they had all represented hemp, like this one, would not the plaintiff have been liable, if it had refused acceptance? But if it would have been liable for refusing, then it was justified in accepting.

VII. But the following adjudicated case seems to completely cover the case at bar, and to establish the principle which is conclusive in plaintiff's favor: *Woods v. Thiedemann* (*Exch.*) 1862, 1 *Hurlst. and Cottmann*, 478.

Blatchford, Seward, Griswold & Da Costa, attorneys, and *Charles M. Da Costa*, of counsel for respondents, argued:—I. The question is narrowed to the consideration of the telegraphic credit, because the drafts were drawn solely under the telegraphic credit, and no drafts were ever drawn under the letter of credit.

II. The inquiry is, now, pertinent—*a*. What telegraphic credit did Messrs. Recknagle & Company request the Bank of Montreal to send to Vogel & Co., and, *b*. How did the Bank of Montreal comply with such instructions?

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The evidence is uncontradicted. It is in writing. The word "documents," used in the plaintiff's dispatch, was a short way of expressing the words, "against consular invoices and full set bills of lading," used in the request of the defendants. The evidence is uncontradicted, that the plaintiff did not observe all the terms upon which the credit was opened, because it accepted and paid drafts which were not accompanied by bills of lading for bales of manila hemp, but only for "bales of merchandise." The departure from such instructions relieved the defendants from any liability, if such departure has caused the loss. There can be no dispute that such departure did have that result.

III. The law simply utters the suggestion of common justice and common sense in declaring that : " When one of two innocent persons must suffer from the treacherous act of a third, he who gave the aggressor the means of doing the wrong, must bear the consequences of the act." The bank gave the aggressor the means of doing wrong, by accepting drafts, which it was not bound to accept, because not accompanied by the documents on which the acceptance was promised.

IV. Neither the plaintiff nor the plaintiff's New York branch ever sent a copy of the telegraphic credit to the manager of the plaintiff from or at London, or informed him of its contents. If, then, the terms and conditions of such letter of credit are at variance with the telegraphic credit, it is clear that the loss arising from the negligence of the plaintiff's agents in New York, in not sending to London a copy of the telegraphic credit, and in themselves determining that the letter of credit was the exact equivalent of the telegraphic credit, must be visited upon it.

V. The rule is elementary that : " If the guaranty propose a credit, that particular credit must be granted, or the guarantor will not be bound " (*Daniel on Negotiable Instruments*, § 1756 ; *Walrath v. Thompson*, 6 *Hill*, 540 ; *Ulster Co. Bank v. Mcfarlan*, 3 *Den.* 553). *Loeb v. Hell-*

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man, 45 *N. Y. Super. Ct.* 336 ; aff'd, 83 *N. Y.* 601, is instructive on this point. Nor are there wanting analogies in the law (*Lovatt v. Hamilton*, 5 *Mees. & W.* 639 ; *Johnson v. Macdonald*, 9 *Id.* 600 ; *Welsh v. Gossler*, 89 *N. Y.* 540, 545, 548 ; *Bowers v. Shaw*, *L. R.* 2 *App. Cas.* 455, 480 ; *Borrowman v. Drayton*, *L. R.* 2 *Exch. Div.* 15).

VI. The defense interposed by the defendants herein is not technical, but meritorious and substantial. They knew the character and appearance of bales of manila hemp. They knew, therefore, that no shipmaster would sign a bill of lading for bales of manila hemp, when other merchandise was shipped in its stead. No master could be misled, for the evidence is uncontradicted that manila hemp is always shipped uncovered, so that it cannot pass for any other merchandise. It is true that the bills of lading contained the words "weight and contents unknown," but that expression would only qualify the words "bales of manila hemp" (had they been inserted in the bill of lading), if manila hemp were covered so that the master could not see for himself whether it was manila hemp or not (*Miller v. Hannibal & St. Jo. R. R. Co.*, 90 *N. Y.* 430). "Contents unknown," when applied to a species of merchandise which can be determined by the eyes by inspection, without opening, is practically meaningless. Again, the defendants were entitled to the observance of the condition that the bills of lading should be for manila hemp, because it afforded them protection against any wrong-doing ; for if the master issued bills of lading for manila hemp, when other merchandise was actually shipped, and money was advanced on the strength of the recitals contained in the bills of lading, both the master and the ship would be responsible (*Myer v. Peck*, 28 *N. Y.* 598, and cases cited ; *Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, 33 *Hun*, 589). Whatever doubt there may be, in view of the decisions in *Schooner Freeman v. Buckingham* (18 *How.* 182), and *Pollard v. Vinton* (105 *U. S.* 7), of the right of the defendants to proceed against the ship, on a bill of lading fraudulently issued

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by the master, the remedy therefor against the master and his share of the ship, if any, is undoubted in all jurisdictions.

VII. It was intimated by the plaintiff's counsel on the trial below, that it was not bound to greater diligence than the defendants were, and that, as the defendants executed, on the surrender to them of the bills of lading, a trust receipt, specifying 2,020 bales of manila hemp, it showed that the plaintiff, in accepting the drafts on the same documents, had equal reason to believe that the shipments were of manila hemp. The argument is entirely fallacious. (a) The liability of the defendants to respond to the plaintiff's demand cannot be determined by a subsequent act of the defendants, entirely disconnected with, and having no relation to, the incurring of their obligation to the plaintiff. However negligent the defendants may have been in giving to the plaintiff in New York such trust receipt, that would not relieve the plaintiff from the result of its negligence and improper acts, committed nearly three months before, in London, in their accepting the drafts without the proper accompanying documents. (b) Besides, the defendants had been thrice informed by the plaintiff that—"documents in order," and had a right to rely on such statement. (c) Again, the defendants acted in the usual way. The trust receipt was filled in at the defendants' office, and sent through their custom-house clerk to the plaintiff, and the bills of lading in exchange for such receipt were delivered to such clerk, and thereupon the clerk immediately took the documents to the custom-house for entry. As matter of fact, therefore, the defendants never saw the bills of lading until after the discovery of the fraud.

VIII. The true rule applicable in this case may be thus stated, viz.: All that a banker is bound to do when he issues a credit against documents, is to see that bills of lading, professing on their face, in the ordinary form, to represent a consignment of the specific merchandise, under which he has authorized the advances, accompany

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the draft, and that the draft is not in excess of the proper amount. If the banker adheres to that rule, he will have discharged his duty, even if it should turn out that the bills of lading were forgeries. But if he disregards the requirements of this rule, and loss happens, the banker must bear such loss (*Young v. Lehman*, 63 Ala. 524; *Woods v. Thiedmann*, 1 Hurlst. & Coll. 478, and *Ulster Bank v. Synnott*, 5 Ir. Eq. 595).

IX. Should it, however, be held that the letter of credit directed to the plaintiff's branch in London, and not the telegraphic credit, is the instrument which is to be the controlling one in this case, then it is submitted that, even in that view, all the foregoing suggestions are alike applicable, and equally result in supporting the decision below, for—*a.* The letter of credit is on one of the usual printed forms of the plaintiff. *b.* The printed words (which are not usually followed by written ones), are "against goods shipped." *c.* In the case at bar, these printed words are followed, and are necessarily qualified and controlled, by the subsequent written words, viz., "invoice cost of 2,500 bales manila hemp at £4 per bale, on a basis of 8s. sterling freight filled up in bill of lading, or at a proportionate reduced rate of advance if freight is higher."

BY THE COURT.—SEDGWICK, Ch. J.—On December 1, 1831, the defendants made written application to plaintiff's agent in New York. It was as follows: "December 1, 1831, Please telegraph authority to Vogel & Co., Hong Kong, to draw at six months, for our account, against consular invoice and full set bills of lading of 2,500 bales manila hemp, p. Robinson, at the rate of £4 per bale, on a basis of 8s. sterling, freight filled up in bill of lading reducing advance if freight higher."

In the evening of that day, the plaintiff's agent sent to Vogel & Co., the following telegraphic dispatch: "Vogel, Hong Kong. Credit 608, six months, issued Recknagle ten thousand pounds, documents 2500 bales manila hemp,

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per Robinson, at £4 per bale, if freight eight shillings or reduced advances if freight higher."

On the next day, December 2, 1881, a letter of credit was made out and delivered to defendants. It was dated December 1, 1881, and addressed to the agents of the plaintiff in London. It authorized Messrs. Vogel & Co., of Hong Kong, "to value on you as follows, that is to say, against goods, shipped per Robinson, via Cape of Good Hope, at six months sight; for any sum or sums not exceeding in the aggregate £10,000 sterling, to be used as they may direct, for invoice cost of 2,500 bales of manila hemp at £4 per bale, on a basis of 8s. sterling freight filled up in bill of lading, or at a proportionate reduced rate of advance if the freight is higher, to be purchased for account of Recknagle & Co., New York, or whom it may concern and to be shipped to New York. . . The bills must be drawn in Hong Kong prior to the 1st day of June, 1882, and advice thereof given to you in original and duplicate, such advice to be accompanied by bill of lading, filled up to order of agents of the Bank of Montreal, New York, with abstract of invoice indorsed thereon, for the property shipped as above. All the bills of lading issued except the one mailed to us and the one retained by the captain of the vessel carrying the cargo, are to be forwarded direct to you. The original invoice, properly certified, to be also forwarded to us. . . And we hereby agree with the drawers, indorsers and *bona fide* holders of bills drawn in compliance with the terms of this credit, that the same shall be duly honored on presentation at your office in London." To this was added a note, "Please sign bills as drawn under Credit No. 608, dated December 1, 1881." On the margin was written: "This credit opened by cable direct, December 1, 1881."

This letter of credit was delivered to the defendants, and they by letter addressed to plaintiff's agents in New York, and dated December, 1881, agreed "to provide for all bills which shall be drawn and accepted under" the let-

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ter of credit "by payment of the amount thereof to you in New York."

The letter of credit was sent to Vogel & Co., on December 13, 1881. It was not sent before, because the first China mail from New York went on that day.

Vogel & Co., in Hong Kong, drew three bills, upon plaintiff at London, at six months, to their own order—the first, on December 3, was for £2,400; the second, on December 6, for £2,000; the third, on December 13, for £3,680. On the face of the drafts it was respectively stated that they were drawn against six hundred, five hundred, and nine hundred and twenty bales of manila hemp.

These drafts were forwarded to plaintiff's agents in London. The draft for £2,400 was accompanied with a bill of lading for six hundred bales of merchandise; that for £2,000, with a bill of lading for five hundred bales of merchandise; and that for £3,680, with two bills of lading for nine hundred and twenty bales of merchandise. Each draft was accompanied with a letter of advice, describing the shipment referred to in it as of "bales of hemp." On each bill of lading was indorsed what were called abstracts of invoices, and which described the shipment as of "manila hemp." These indorsements were made by Vogel & Co. after the bills of lading had been signed and delivered to them by the captain, and without his knowledge or consent.

The bills of lading acknowledged the shipment of "bales merchandise being marked and numbered as in the margin," "weight and contents unknown."

The plaintiff's agents, upon the arrival of the ship in New York, delivered the documents that had accompanied the drafts, upon acceptance in London, to the defendants in trust. They gave a receipt which termed the property, "two thousand and twenty bales hemp." They entered the goods at the custom-house and paid the duties, before inspecting the goods. In fact, there was of hemp in the various shipments, only five hundred bales. It is agreed that this accompanied the bill of lading for the draft of

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December 7, for £2,000. All the other packages were of matting—an article of much less value than manila hemp.

The judge found, on the evidence before him, that “a roll of matting is a round cylindrical bale or roll, weighing about forty-five or fifty pounds and covered with a grass mat. A bale of manila hemp, weighs within a few pounds of three hundred, is square, like a cotton bale, and of not much less size. It is not covered by any matting or other covering. It is compressed and very hard, and strings of manila hemp are laid round it, as fastenings. On each bale of manila hemp, a patch is sewed, on which to put the mark; otherwise it has absolutely no covering.”

The matting was sold by agreement, and the proceeds of sale were about \$2,000.

The plaintiff claims that the defendants are liable, under their agreement, for the amounts paid upon the acceptances of £2,400 and £3,680, and the complaint asks judgment for those amounts, together with judgment that certain security given by the defendants be sold, etc.

The defendants claim that their liability under their agreement is “to provide for all bills which shall be drawn and accepted under” the letter of credit, and that the drafts upon which the plaintiff now claims were not drawn and accepted under that letter; because, first, the bills were drawn under the telegraphic despatch, and, second, the plaintiff, in accepting the bills, did not observe the conditions upon which the defendants were to become liable, under either the telegraphic despatch or the letter.

I am of the opinion, that the various instruments, that is, the original request of the defendants, the telegraphic despatch induced by it, sent to Hong Kong, and the letter of credit, have such intrinsic or expressed reference to each other, that they must all be considered at one time, to know the agreement.

It appears from them, that defendants' responsibility to plaintiff was not to be based upon the nature of the relation between Vogel & Co. and the defendants, or the

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interest of the defendants in the hemp, but upon the character of certain instruments. If the instruments had the character described in the agreement, there was liability, otherwise, none. It is immaterial that Vogel & Co. committed the fraud of shipping matting and not hemp; for, assuming that they were agents of defendants, the agreement was that the acceptance and payment of the drafts should not create responsibility on the defendants' part, unless the documents were of a certain kind. There was provision, in substance, for a protection of defendants against the acts of their agents, if Vogel & Co. were agents.

It is clear that the document most important to the interests of both parties was to be the bill of lading. There might be a controversy as to whether the letter of credit required that a consular invoice should accompany the draft; but it and the despatch and the written request, call for a bill of lading. The request refers to "bills of lading of 2,500 bales of manila hemp." The despatch includes bills of lading when it refers to "documents 2,500 bales of manila hemp." The letter of credit requires the delivery of "bill of lading . . . for the property shipped as above;" that is, the 2,500 bales of manila hemp mentioned above. And in truth, all the other documents—the invoice, the consular copy of it, the letter of advice—were of inferior importance, because they were of such slight import as to the fact of hemp being shipped and not something else.

The important question is, what kind of a bill of lading was intended by the parties? At the present point of time, the interest of the plaintiff is to make the kind of bill less stringent than the defendants now insist upon. When the contract was made, it was the interest equally of both parties, to have the bill of the utmost significance practicable, as to the assurance from it that hemp was the article shipped. They evidently, as the learned counsel for appellant claims, referred to the contingencies of

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actual shipment, and not to such a bill of lading as a master would have the right to refuse to sign.

The respondents do not claim that they were not to be liable if in fact hemp was not shipped, without regard to the character of the bill of lading. They do claim that the bill should specifically refer to the shipment as one of manila hemp.

Both parties desired a bill of lading that it was possible for a shipper to procure if he shipped hemp. And they wished it be of such a kind as from its effect as evidence, and its guaranties of certain rights in an action against the master, the owner, or the ship, would lessen the chances that the shipment might be something other than hemp. In other words, the bill of lading was to be such as a shipper of hemp, using his legal rights under the law merchant, according to the custom of merchants, could procure, and which, on its face, would show, as far as possible, as against the shipper and the master, that the shipment was of hemp. The right of the shipper would be correlative to the right of the master to limit responsibility under the bill to a lawful extent.

It was suggested that bills of lading seldom referred to the quality of the shipment. Cases reported, however, show otherwise. The old form in *Abbott on Shipping* (ed. of 1856, 235), is a bill of lading for "twenty bales containing one hundred pieces of broadcloth marked and numbered per margin." *Smith Mercantile Law*, 376, repeats this form. The Columbo (3 *Blatch.* 521) refers to a bill of lading of casks "containing bristles." The Bel-lona (4 *Ben.* 503) refers to a bill of lading that described the shipment of "boxes of raisins." *Lebeau v. Gen. Steam Nav. Co.* (8 *L. R. C. P.* 88), contains a bill of lading of "linen goods." *Fassett v. Ruark* (3 *Ann. La.* 694) concerned a bill of lading for "thirty-three bales and twelve cases domestics."

Much does not seem to be said in the books specifically of a right of a shipper to have the quality of the goods shipped described in the bill of lading, but the principles

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given as to the rights of the master to limit responsibility, imply much on this subject.

In *Abbott on Shipping*, 252 (ed. of 1856), is a statement of the law that implies that a shipper has a right to some sort of description of the quality, if that quality can be known by the master. "If there is any dispute about the quantity or condition of the goods, or if the contents of casks or bales are unknown, the words of the bill of lading should be varied accordingly.

"By the French ordinance it is required that bills of lading should contain the quality, quantity and marks of the merchandise, &c. It is obvious that the quality, and frequently also the quantity of the goods, must be unknown to the master; and the commentator (Valin) on the ordinance informs us that by the quality, the exterior and apparent quality is only meant, and further, that it is usual for the master to insert words denoting that the quality and quantity are only according to the representation of the merchant, of which practice he approves, &c."

In *Parsons' Maritime Law*, 143 (ed. of 1859), it is said: "The bills of lading are evidence against the master or the owner of the ship, not only as to the reception of the merchandise, but as to any material fact stated in them, respecting the quantity or quality or any other element in the description of the goods. It is, therefore, usual to describe them only as so many boxes or bales, or parcels numbered and marked as per margin. Sometimes the words contents unknown, or said to contain, &c. are added, and if the words 'containing, &c.' are added, which is also not unusual, the master and ship are held only to deliver the boxes as they were received by them."

It is evident, that customarily the shipper and the master, at the time of forming the bill of lading, have their attention fixed upon what statement shall be made in it as to the quality of the merchandise. It seems to be a reasonable demand of the shipper, that so far as the quality is disclosed by the external appearance of the

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shipment, that quality shall be given in the bill of lading. The object in part of any statement as to the shipment, is that of identifying the latter, and there is no reason for refusing to do that by description of quality when it appears.

The master, it is true, may add the words that were added in this case, "contents unknown," in a proper case; that is, when the contents do not appear. But should there be a statement of the quality of the shipment, these added words will not neutralize the statement, but only qualify it, so that the whole will be considered to mean that the external appearance, if there be an external appearance, was of the quality specified.

The cases cited in *Lawson on Contract of Carriers*, § 207, support the statement of the law on this point: "'Value and contents unknown.' These words exclude the inference of any admission by the carrier as to the quantity or quality of the contents of the package of the time of delivery, beyond what is visible to the eye or apparent from handling it. Nothing is implied but the receipt of the property in good order externally, and the carrier may show by parol that the value and contents were below the estimate placed upon them by the shipper (*The California*, 2 *Sawy.* 12; *The Columbo*, 3 *Blatchf.* 521; *Clark v. Barnwell*, 12 *How.* [U. S.] 272)." A receipt for boxes of raisins would imply the receipt of "boxes filled with raisins" (*The Bellona*, 4 *Ben.* 503; 2 *La. Ann.* 694; *Lebeau v. Genl. Steam Nav. Co.*, *L. R.* 8 *C. P.* 88).

In the present case, the evidence is convincing that if the shipment had been of manila hemp, it would have had the external appearance of that article, and that a shipper, in the ordinary course of trade, might have procured a bill of lading, which, in appropriate words, would have signified that fact.

Practically, both the parties to this action would have had, in such a bill of lading, and in the circumstances which would give rise to such a bill, an important guard against the fraud that was practiced. For, on the facts,

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it would have been much more difficult to make a bale of something comparatively without value, that would have the external appearance of hemp, and in bales of the usual shape in trade, than to commit the fraud disclosed by this case. This, however, is not a test of the rights of the parties. The question is, was the bill of lading of the kind intended by the agreement of the parties?

It was argued that the intention was to describe documents that, taken together, would import that the shipper had shipped hemp, and that such was the import of the documents generally, although one of them, in the bill of lading, used the word merchandise. As to this, it may be said that the documents were to be such as would be in London before the plaintiffs were to accept the bills of exchange, and that in fact there was in London, only the bills of lading, and an indorsement upon their backs of "abstracts of invoices." These abstracts were no part of the bills of lading, were not supposed to be presented to the master, and had nothing to do with the identification of the kind of shipment that was in fact made. The security consisted of the bills of lading, and the intention was they should be of "manila hemp."

My opinion on the whole case is that the parties intended that the bill of lading should refer to manila hemp specifically. It is unnecessary to decide what form should have been adopted. If the form were "bales of manila hemp, contents unknown," or "said to be," or "having the appearance" of manila hemp, the parties would have had an assurance that is absent from the case.

Judgment affirmed, with costs.

VAN VORST, J., concurred.

Statement of the Case.

THOMAS C. CLARK, APPELLANT, v. JOSEPH BLUMENTHAL, ET AL., RESPONDENTS.

Trial forum—at special term or by jury—test of.—Reformation sealed contract.

The test as to the kind of trial to which plaintiff is entitled, is the nature of his demand. If, upon any supposed state of facts set out in the complaint, he claims to have a right to equitable relief, he has a right to a trial at special term. This, though it be perceived that the complaint is clearly insufficient to sustain the demand for equitable relief.

Where a demand is made for damages, and such demand is secondary to the primary demand for equitable relief, notwithstanding such joinder, the plaintiff is still entitled to have the case tried at special term, at least primarily.

Where the right to recover damages, as prayed for, depends on the reformation of a sealed contract, as prayed for, the plaintiff is entitled to a trial at special term, at least primarily.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal by plaintiff from order striking the case from the calendar of issues of fact at special term, and directing that the issues be tried before a jury.

The complaint contained, among others, the following averments: that the defendant, Weinberg, held the legal title of certain real estate, but "solely as the repository or trustee of the defendant, Blumenthal, and without any personal pecuniary interest therein whatever," and that, at all the times referred to, "the said Blumenthal received and appropriated to his own use, the entire rents and profits thereof, to a large amount;" that defendant Blumenthal negotiated and made an agreement with the plaintiff, "to convey said real estate to the latter, and received from him \$1,000 on account of the purchase money;" that "in pursuance of such agreement, the plaintiff and defendant executed each to the other an instrument under seal;" that this instrument, on its face, was made between

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the defendant, Weinberg, and the plaintiff, and was for the sale by the former and purchase by the latter of the real estate specified, and was executed by Jacob B. Weinberg (the defendant) under his seal, "per Joseph Blumenthal," the other defendant; that at the time of the execution of the instrument, defendant Blumenthal represented to plaintiff that Weinberg (defendant) was "the true, lawful and equitable owner of the said premises;" that before the date fixed for the performance of the agreement the defendant, Blumenthal, "sold and procured defendant Weinberg to convey the premises to one Goldstein;" and that defendant, Blumenthal, received and appropriated to his own use \$18,000, paid by Goldstein to him, said Blumenthal, as, and for, the consideration of the sale; that the plaintiff had sustained damages in the sum of \$19,000, in the manner particularly alleged in the complaint, &c.; . . . "Wherefore the plaintiff demands judgment that the before-mentioned agreement," . . . "be reformed by inserting the name of Joseph Blumenthal, as party of the first part thereto, in place of the defendant, Jacob B. Weinberg, or that the defendant, Blumenthal, be adjudged to be the true party in interest and individually affected by the said agreement and the covenants of the party of the first part therein specified; that the plaintiff recover from the said Joseph Blumenthal the aforesaid sum of \$19,000 with interest."

After answers were served, the plaintiff placed the cause upon the special term calendar for the trial of issues of fact. Upon defendant's motion, the cause was stricken from that calendar, and the order then made directed that the issues be tried before a jury.

The present appeal is by plaintiff from this order.

T. M. Tyng, attorney, and of counsel for appellant, argued:—I. This is purely an equitable action and triable by the court at special term without a jury. The action is brought to reform a sealed instrument by making the defendant Blumenthal the real party of the first part

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thereto ; or to charge him, in equity, with responsibility for the performance of the covenants therein. The equitable relief demanded in the first prayer of the complaint is of the essence of plaintiff's recovery ; and, unless that is awarded him, the action must fail of result (*Carroll v. Deimell*, 65 N. Y. 252). No action at law could be maintained against Blumenthal on this sealed instrument (*Briggs v. Partridge*, 64 N. Y. 357 ; *Story on Agency*, §§ 160, 162, 422, 450, 451, 452). Full and adequate relief can be given in a trial at the equity term. A court of equity, having acquired jurisdiction of an action for the reformation of a contract, has power to proceed and award damages in the contract as reformed (*Maher v. Hibernia Ins. Co.*, 67 N. Y. 283 ; *Andeson v. Metro. L. Ins. Co.*, 18 *Week. Dig.* 192 ; *Seeley v. N. Y. Nat. Bank*, 8 *Daly*, 400 ; 78 N. Y. 608).

II. The court below erred in awarding costs upon this motion. This was not a motion made upon notice, but a suggestion made without notice at the commencement of a trial, and we submit that sections 3236 and 3251, subdivision 3, provide simply for " motions in the action," regularly noticed and brought on for hearing pursuant to section 780.

Joseph Ullman, attorney, and of counsel for respondent Weinberg, argued:—I. This defendant is entitled to a jury trial. The complaint sets forth a cause of action against him (if at all) for damages for breach of a written contract to convey land. No allegations entitling the plaintiff to equitable relief against this defendant are made, and no equitable relief is demanded. Even if it had been, the defendant " cannot be deprived of a jury trial in a proper case, because the plaintiff has demanded equitable instead of legal relief " (*Davison v. Associates*, 71 N. Y. 340).

II. Nor can this defendant be deprived of that right by the joinder of an equitable cause of action against other defendants (*Wheelock v. Lee*, 74 N. Y. 495).

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III. This defendant has pleaded a counter-claim which is purely legal and not equitable in its nature, and which he is entitled to have tried by jury.

Simson Wolf, attorney, and *Joseph Ullman*, of counsel for respondent Blumenthal, argued:—I. The complaint demands “judgment for a sum of money only,” and the defendants are therefore entitled to a trial by jury (*Code Civ. Pro.* § 968). If there is any claim for equitable relief in the complaint (which this defendant denies) it is merely auxiliary to the main cause of action. In such a case, there must be a jury trial (*Penny v. Gillett*, 7 *Week. Dig.* 101; *Ic3 Co. v. Insurance Co.*, 20 *How. Pr.* 424; *Wheelock v. Lee*, N. Y. 500).

II. There is no equitable feature in the case. The suit is not for reformation of a contract. A contract cannot be reformed by adding parties to it. A court of equity cannot reform an agreement except between the original parties (*Cady v. Potter*, 55 *Barb.* 463; 5 *Wait's Actions & Defenses*, 451, § 8; *Adams' Equity*, 349, 6th Am. ed. 1873). There is absolutely no authority for an action to reform a written instrument by including a new party. The only case cited below was *Bartholomew v. Insurance Co.* (34 *Hun.* 363), where the court expressly declined to pass upon the question. This action, therefore, it is insisted, is not for the reformation of the contract, notwithstanding the use of that word in the complaint.

III. The action, as against this defendant, is simply one against an undisclosed principal, which is purely a common-law action. The judgment demanded is damages for breach of a written agreement, this defendant being alleged to be—not the party named in the agreement—but his undisclosed principal.

IV. It was argued below that the appellant had no remedy at law. That is no reason why he has one in equity. He must first show a right. His action is for damages for breach of contract—purely a common-law action. If he has no remedy at law, he certainly has none in equity.

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The court, however, is not concerned with the question whether there is a remedy elsewhere or not. The cause of action disclosed by the complaint being one for a jury, the equity term could not retain it, and properly struck it from its calendar.

BY THE COURT.—SEDGWICK, Ch. J.—Section 968 of the Code of Civil Procedure is, that in an action in which the complaint demands judgment for a sum of money only, an issue of fact must be tried by a jury, and also in actions of ejectment, for dower, for waste, for a nuisance, or to recover a chattel. Section 969 is, “An issue of fact not specified in the last section must be tried by the court.” It is at once perceived that the test of the kind of trial is not the legal conclusion from the facts averred in the complaint, but is the nature of the demand. If, upon any supposed state of facts set out in the complaint, the plaintiff claims he has a right to equitable relief, he has the right to present the claim for adjudication to the court at special term, and is not forced in the first instance to a trial by a jury. He has a right to the judgment of the court, and if it be unfavorable to him, then to the advantages of appeal from the judgment. Even if it be perceived that the complaint is clearly insufficient to maintain his demand for equitable relief, he still has the right to have that determined by the special term.

It is suggested in this case that the real substantial demand is for a judgment for a sum of money only. So far as defendant Blumenthal is concerned, it will be necessary for the plaintiff to have the contract reformed by making Blumenthal a party to it, before the claim for damages can be considered against him, and therefore the money demand is secondary to the primary demand for reformation. As to Weinberg, the complaint makes no personal demand, other than such as may be connected with his right to resist the placing of Blumenthal in the contract in his stead. I am of opinion that the plaintiffs had a right to have the issue tried, at least primarily, at special term.

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It was asserted that the order appealed from, was made at special term after the case had been called for trial. The printed papers disclose an order made without reference to the case actually being on trial. The court, therefore, had the power to impose costs of motion, without any controversy as to what would have been its power if the order were made in the course of the trial.

The order appealed from should be reversed, with \$10 single costs, and the motion below denied, with \$10 single costs, and the order entered should provide that the case be placed on the special term calendar for trial.

VAN VORST and FREEDMAN, JJ., concurred.

THOMAS MACKELLAR, RESPONDENT, v. GEORGE W. ROGERS, IMPLEADED, &C., APPELLANT.

Mortgage—covenant for the appointment of a receiver.

A defense that the mortgage was given to secure advances to be used in the erection of buildings on the mortgaged premises; that the mortgagee failed to make the advances as required by the mortgage, in consequence whereof the mortgagor was compelled personally to advance a large sum to complete the work, and then, to save his credit, to sell the houses erected at a large reduction from their actual value, is not a good objection to the granting a motion made, pursuant to a covenant to that effect in the mortgage, for the appointment of a receiver.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from an order appointing a receiver of the rents and profits of the mortgaged premises during the pendency of the action to foreclose the mortgage.

The motion was founded upon a covenant in the mortgage, that after default in payment of principal or interest, the mortgagee or his assigns should be at liberty, immediately after any such default, upon a complaint

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filed on the foreclosure of said mortgage, to apply for, and should be entitled, as a matter of right, and without regard to the value of the mortgaged premises, or the solvency or insolvency of any owner of said premises, or of the mortgagors, and on ten days' notice to the mortgagors, to the appointment by any competent court of a receiver of the rents, issues and profits of said mortgaged premises.

Martin J. Keogh, attorney, and of counsel for appellant, after citing as to the general principles appertaining to the appointment of receivers when there is no covenant in the mortgage, the cases of *Sea Ins. Co. v. Stebbins*, 8 *Paige Ch.* 565 ; 1 *Hillard Mort.* 467, and cases cited ; *Shotwell v. Smith*, 3 *Edw. Ch.* 588 ; *Warner v. Gorman's Executors*, 1 *Barb.* 36 ; *Callanan v. Shaw*, 19 *Iowa*, 183,—argued :

A valid defense to this action interposed by sworn answer, and not met by affidavits affirming the validity of the mortgage and denying the truth of the facts set forth in the answer, and opposing affidavits, even where the mortgage contains a stipulation that a receiver shall be appointed as a matter of right, is a sufficient and controlling reason for not disturbing the possession of the mortgagor and denying this motion (*Knickerbocker Life Ins. Co. v. Hill*, 2 *Hun*, 680 ; *Hollenbeck v. Donnell*, 94 *N. Y.* 342).

George M. MacKellar, attorney, and of counsel for respondents, cited : *Jones on Mortgages*, § 1516 ; *Quincy v. Cheeseman*, 4 *Sand. Ch.* 404 ; *Shotwell v. Smith*, 3 *Edw.* 588 ; *Bank of Ogdensburgh v. Arnold*, 5 *Paige*, 40 ; *Hollenbeck v. Donnell*, 94 *N. Y.* 342.

BY THE COURT.—SEDGWICK, Ch. J.—Practically, the parties by contract have made the rents and profits of the kind referred to in the order appointing a receiver, a part of the security for the payment of the amount of the bond and its interest. Unless the receiver asked for

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should be appointed, the mortgagee would not get the lien upon the rents that the contract intends he should.

Possibly an answer supported by affidavits, that the mortgage itself and the covenant referred to, had never been made, and were, if made, void or invalid for a sufficient reason, might justify the denial of such a motion. In this case, however, the objection to the motion is, "that the mortgage was one given for a builder's loan; that the mortgagee omitted and failed to advance the moneys represented by the mortgage; and that, in consequence of that default of the mortgagee, the mortgagor had been compelled to personally advance \$30,000 to complete the work, and then, to save his credit, to sell at a large reduction from their actual value the houses so erected." The affidavits to support this objection are vague, and it is impossible to extract from their general statements enough of particular fact to enable a court to say that the defense is valid, and will probably succeed. If the court should hold that the mere possibility of success is reason for denying the motion, the plaintiff might be deprived of all benefit of the covenant.

My opinion, however, is that such a defense is not in its nature a good objection to the appointment of a receiver. The covenant means that the mortgagee shall have the benefit while the litigation is pending, down to the only sufficient and competent mode of deciding the issues of an action.

The order should be affirmed, with \$10 costs.

VAN VORST and FREEDMAN, JJ., concurred.

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HENRY DAY, APPELLANT, v. THE BANK OF THE
STATE OF NEW YORK, IMPEADED WITH THE
MUNICIPAL GAS LIGHT CO. OF NEW YORK,
RESPONDENT.

Joinder—Causes of action—Owner of stock against possessor of the certificate and the company.

An owner of stock of a company, from whom the certificate thereof has been taken wrongfully and without his knowledge, and delivered to a third party, cannot unite a cause of action or claim against said third party, with a cause of action in a claim against the company, unless the allegations of the complaint show that the several claims are parts of a single claim or cause of action.

Allegations that plaintiff is the owner of certain stock of a company; that the certificate thereof was wrongfully, and without his knowledge, taken from his possession, and delivered to a third party, having on it a power to transfer, the plaintiff's name to which was forged; that said third party refused to return the certificate, and claimed to the company that the certificate had been duly assigned to him, and that he was the lawful holder thereof; and that in consequence the company, although requested, had refused to recognize the plaintiff as the owner of the shares; coupled with a demand for judgment that plaintiff be adjudged to be the owner of the shares, and that the company may be compelled to recognize him as such, to act accordingly, and to account for dividend.—*Held*, on demurrer, to be insufficient, under the above rule.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal by plaintiff from judgment entered upon order and interlocutory judgment sustaining defendant's demurrer to complaint on the ground that it improperly unites causes of actions.

The complaint averred that the plaintiff is the owner of certain shares of the capital stock of the defendant, The Municipal Gas Light Company, and was formerly in possession of the certificates for the shares; that the said certificate was wrongfully, and without his knowledge, taken from his possession and delivered to the defendant,

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The Bank of the State of New York, having upon it certain instruments purporting to authorize the transfer of the shares, and to be signed by plaintiff ; that plaintiff's name had been forged upon the instruments ; that the plaintiff had requested the bank to return the certificate to him, and that it had refused to do so, and has claimed and does claim to, among others, the defendant The Municipal Gas Light Company, that the certificate has been duly assigned to it, and that it is the lawful holder thereof ; that in consequence the defendant, The Municipal Gas Light Company, although requested, has refused to recognize the plaintiff as the owner of the shares ; and it demands judgment that the plaintiff may be adjudged to be owner of the said shares ; that the Municipal Gas Light Company may be compelled to recognize him as such owner and to act accordingly ; to account for dividends already declared, which have not been paid to him, &c.

The defendant, The Bank of the State of New York, demurred on the ground that causes of action had been improperly united.

The demurrer was argued at special term before INGRAHAM, J., who delivered the following opinion :

" It is rather difficult to determine from the complaint what cause of action the plaintiff has against The Municipal Gas Light Company. It is not alleged that the plaintiff's shares of stock in The Municipal Gas Light Company have been transferred on the books of the company. It is not alleged that dividends have been declared on the said stock which the company refused to pay, or that The Municipal Gas Light Company has done any act inconsistent with plaintiff's ownership of the shares of the stock.

" The general allegation that The Municipal Gas Light Company, although requested, has refused to recognize the plaintiff as the owner of the stock, is simply a conclusion and not a fact.

" On the transfer of the shares of stock of the company to the plaintiff, he became a member of the corporate

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body, and thereby became entitled to partake in the surplus profits of the corporation, and ultimately, on the dissolution of the corporation, to so much of the capital of the corporation as was not required to pay its debts (*Burrill v. Bushwick R. R. Co.*, 75 N. Y. 216). And the owner of such shares in the stock of the company can, under some circumstances, maintain an action to compel the corporation to issue and deliver to him the written evidence of the existence of such shares, and of the ownership of them—a paper usually called a stock certificate.

“The plaintiff in this action alleges that such a stock certificate has been issued by the corporation to him, and that such stock certificate is still outstanding.

“The mere declaration of a dividend by the defendant, which the defendant refuses to pay to the plaintiff, the lawful owner of the stock, would not justify this action, for by a declaration of such dividend the corporation becomes a debtor of the stockholder for the amount of the dividend declared, and for such debt he may maintain his action (*Williams v. Western Union Tel. Co.*, 93 N. Y. 192).

“The mere possession of the written evidence of the ownership of the shares of stock by the defendant, The Bank of the State of New York, does not, as between itself and the gas company, give the bank the right to participate in the management, profits, or property of the defendant corporation. In order to vest the bank with the title to the shares of stock, as between it and the plaintiff, it is necessary that the plaintiff should have assigned by an instrument in writing his interest in the stock of the corporation, and it is necessary to a valid transfer that the assignment and power of attorney to make all necessary transfers, should be executed by the owner of the stock (*McNeil v. Tenth Nat'l. Bank*, 46 N. Y. 330). But as between the purchaser and the corporation, until a transfer on the books has been made, he is not a stockholder, and has no claim to act as such, but possesses merely a right to make himself a stockholder by

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the prescribed form (N. Y. & New Haven R. R. Co. v. Schuyler, 34 N. Y. 80).

"The complaint does allege a good cause of action against The Bank of the State of New York for the recovery by plaintiff of the stock certificates.

"In some cases an action in equity for the specific delivery of papers wrongfully detained can be maintained (*Hammond v. Morgan*, 51 *Super. Ct.* 478). This cause of action for the recovery of such certificate is entirely separate and distinct from any claim that the plaintiff might have against the corporation for the refusal to pay him dividends or allow him to participate in the management of the corporation; and while it might be, in an action brought by a shareholder of the corporation, to compel such corporation to issue to him evidence of his ownership of the shares of stock belonging to him, or to allow him to participate in the management of the corporation, that a third party claiming to own some interest in the stock claimed by the plaintiff would be a proper party to such action, the facts as alleged in this complaint do not make out such a cause of action.

"The controversy as to the ownership of the stock certificate is between the plaintiff and the bank only, and with that controversy The Municipal Gas Light Company has nothing to do, and the recovery, by plaintiff, from the bank, of the stock certificate and instrument purporting to be an assignment and power of attorney annexed thereto, will, so far as appears, be all the relief to which, from the facts alleged, plaintiff is entitled, and will vest the plaintiff with full title to the stocks.

"The demurrer must therefore be sustained, with leave to plaintiff to amend the summons and complaint on payment of costs."

Franklin Lord, attorney, and *John E. Parsons*, of counsel for appellant, on the questions considered in the opinion, argued:—I. It is respectfully submitted that a good cause of action was alleged as to the gas company,

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and that to the action the respondent was a proper party. (1) The certificates of the gas company's stock were issued by the company to Mr. Day. As a stockholder, he was entitled not only to dividends, but to all the other rights which belong to the ownership of stock, including a participation in management, the important right to vote at stockholders' meetings, to examine books, to have dividends declared to his name, so as to be able to collect or transfer the right to them without impediment, etc. (2) If the gas company refused to recognize Mr. Day as a stockholder, he had a cause of action to compel it to do so; and it was not necessary for him to wait until a dividend had been declared to another name, or a stockholders' meeting had been had, at which his vote was lost, before applying to a court for relief. An absolute refusal to recognize Mr. Day as a stockholder, put, too, upon the alleged transfer of his stock, justified an immediate action by him.

II. That a stockholder of a corporation, whose certificates have been wrongfully taken from his possession, and gone into the possession of third parties with forged transfers, may in equity sue his company if it claim that the stock has been transferred, and refuses to recognize him, and that to such an action the third party, whose wrongful possession of the certificates creates the difficulty, may be joined as a party, is settled by authority (*Cottam v. Eastern Counties Ry. Co.*, 1 *Johns. & Hem.* 243; *Johnson v. Renton*, *L. R.* 9 *Eq.* 181, 188; *Denny v. Lyon*, 38 *Pa. St.* 98; *Taylor v. Great Indian Ry. Co.*, 4 *De Gex & J.* 559; *Lowry v. Commercial Bank*, *Taney C. C. Dec.* 310, 399; *Pollock v. National Bank*, 7 *N. Y.* 274; *Pomeroy on Remedies, &c.*, § 455; *Cahoon v. Bank of Utica*, 7 *N. Y.* 486; *Reed v. Stryker*, 4 *Abb. Ct. App.* 26; *Lattin v. McCarty*, 41 *N. Y.* 107; *Meyer v. Van Collem*, 28 *Barb.* 230; *Palen v. Bushnell*, 46 *Ib.* 24; *Richtmyer v. Richtmyer*, 50 *Ib.* 59; *Hammond v. Cockle*, 2 *Hun*, 495).

Were there not direct authority, true principles of law would cover the case. Where the original certificates of

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stock are outstanding in third hands, it is reasonable and proper that the right of such third party shall be determined in the action brought by the stockholder, thus protecting the company from a double claim. It is in consequence of the claim of the respondent that the gas company refuses to recognize Mr. Day as a stockholder. To establish Mr. Day's right, the substantial controversy is with the respondent. That being settled in this action, judgment against the gas company will go as a necessary consequence. Were Mr. Day to be driven to the necessity of first suing the respondent in equity for his certificates, the gas company might still continue its refusal, and thus force Mr. Day to a second suit. The whole subject is one and should be disposed of in one action.

Shipman, Barlow, Larocque & Choate, attorneys, and *Joseph Larocque*, of counsel for respondent, argued :—I. The complaint states two causes of action : 1. A cause of action against the gas company to recover dividends, past and future, on shares standing in the plaintiff's name, and to compel his recognition as a member of that corporation. 2. A cause of action against the bank to recover certain certificates of stock and assignments attached thereto, of which the plaintiff claims to be the owner, and entitled to the immediate possession.

II. These two causes of action so united do not both belong to either one of the subdivisions of section 484. 1. The cause of action stated against the gas company, so far as it relates to dividends, falls under subdivision 1. It is a cause of action arising "upon contract, expressed or implied." When a dividend is declared by a corporation, the stockholder becomes the creditor of the corporation in respect of such dividend, and may maintain an action for its recovery. 2. The cause of action stated against the bank is for the recovery of chattels, viz., certain instruments described as stock certificates, with assignments and powers of attorney attached, and this cause of action falls within subdivision 7 of section 484.

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III. The said causes of action are improperly united, in that they do not each affect all the parties to the action. 1. So far as the cause of action stated against the bank is concerned, the gas company is not affected by it, and is in no sense a necessary party to its determination. The two corporations are strangers to each other. The issue presented by that cause of action is as to the ownership and right to the possession of the certificates, assignments and powers. 2. So far as the cause of action stated against the gas company is concerned, the bank is not affected by it. The bank does not claim to be a member of the gas company, and until duly admitted to such membership, would not be heard to assert any right to any dividends declared on the shares in question, or to exercise any right of membership (*Equitable Life Society v. Schermerhorn*, 60 *How.* 377).

IV. Neither can subdivision 9 of section 484 be successfully invoked to sustain the joinder of these causes of action, because : 1. As before shown, they respectively fall under different subdivisions preceding subdivision 9 ; and, 2. Because they do not arise out of the same transaction or transactions connected with the same subject of action. (a.) The transaction out of which the plaintiff's cause of action against the gas company arises, occurred many years ago, when the plaintiff was admitted as a member of the gas corporation. (b.) The transaction out of which the alleged cause of action against the bank arose, is a recent transaction, with which the gas company had nothing to do, and relates to the acquisition by the bank of the possession of certain certificates, with powers of attorney and assignments thereto attached (*McDonald v. Kountz*, 58 *How.* 152 ; *Thompson v. St. Nicholas Bank*, 61 *Ib.* 163 ; *Wiles v. Suydam*, 64 *N. Y.* 173 ; *Equitable Life Assurance Soc. v. Schermerhorn*, 60 *How.* 477 ; *Keep v. Kaufman*, 56 *N. Y.* 332).

V. The English authorities relied upon by the learned counsel for the plaintiff below, and the cases arising in other states to which he refers, it is respectfully sub-

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mitted, throw no light upon the questions presented in the case at bar. These questions are controlled by the provisions of section 484 of our Code, and by the decisions of our tribunals giving construction to that section, and though the books are full of cases in which the provisions of this section have been construed, no authority in them can be found in conflict with the views expressed by this court at special term, in sustaining the demurrer in the case at bar.

BY THE COURT.—SEDGWICK, Ch. J.—I think there can be no doubt that the complaint sets out such facts as would be the foundation of two separate actions, one against each defendant. On a demurrer of this kind, it is not a question as to whether the statement of facts is sufficient to show that the causes of action exist. Only the natures of the causes of action are to be considered. If there be no other consideration to be invoked, then, under section 484 of the Code, the complaint is defective, because each cause of action does not affect both defendants.

But it must be apparent that this does not of itself necessarily decide the controversy. For there may be a narration in a complaint, which sets up causes of action severally, and yet may also show what may be called another or third cause of action, which is but a single cause, embracing the two other causes. Such pleading occurs generally in an action to enforce an equity remedy. A familiar example is a judgment creditor bringing an action to compel payment of his judgment out of property that has been conveyed, as alleged, in fraud of creditors, by separate transfers to some or all of the defendants severally. In such an instance, the plaintiff might proceed against the defendants severally, and it would appear on the face of the complaint that there were several causes of action. Yet in fact the complaint would set out but one cause of action, which would be the right to pursue the whole of the debtor's property as a totality, and the

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several transferees, as claiming parts of the whole, would be competently made defendants to allow the plaintiff's remedy to be enforced.

It must then be asked, what remedy beside the two causes of action just alluded to, does the plaintiff claim, which embraces the two, or to enforce which completely, it will be necessary or important to plaintiff to enforce the two.

Looking first at the claim against the bank, it will not be necessary to enlarge the proposition that all of the plaintiff's right as against it could be fully enforced without the presence of the gas company as a defendant. The gas company is not averred to have or claim any interest which, if set up, would appear to affect the plaintiff's claim that the bank should deliver up the certificates.

The next basis for an equitable single cause of action to be examined is the plaintiff's claim against the gas company. What is that claim? The complaint states, that the bank is in possession of the certificates of shares, and claims to be the holder of them, through transfers to which plaintiff's name had been placed, by forgery, and has claimed to the gas company "that by reason of the said papers, the said stock has been duly assigned to it, and that it is the holder thereof." The complaint then avers: that "in consequence, the defendant, The Municipal Gas Light Company of New York, has refused to recognize the plaintiff as the owner of the said shares of stock." It is very important to discover what fact is pleaded in the phrase, "has refused to recognize." The complaint does not aver that the gas company has transferred to the bank upon its books the shares, or has declared any dividend to shareholders, or has even threatened to transfer to the bank. These things, not being pleaded, are presumed not to exist. If the plaintiff claimed against the defendant gas company, that it had transferred the shares to the bank, and that it should replace them in the name of the plaintiff, it might plausibly be argued that the bank could be made a party as an

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adverse claimant. Such is not this case. The refusal to recognize, &c., can amount to nothing more than the expression of what may be called a judgment of the gas company, as to the rights of plaintiff. As there is no demurrer to the sufficiency of this as a statement of the cause of action, the question is not whether there can be judgment for it, but it is whether the claim of the bank, as set up in the complaint, has any relation to the position of the gas company, which would deprive the plaintiff of the advantages of the judgment he claims against the company. It does not seem to have any relation. It seems that the refusal to recognize was the consequence of the bank making the claim set out in the complaint, upon certain assertions of fact, in the nature of evidence; but that would be immaterial to the plaintiff obtaining judgment for a recognition, if the plaintiff could furnish sufficient evidence that the assertions of fact were untrue. The plaintiff could enjoy such a judgment to every extent, and the claim of the bank would not be an incumbrance upon it, or impair or diminish its advantages. It could be obtained with the certificate in the hands of the bank; for on the pleadings it is still plaintiff's property, and the apparent assignment upon it is really a nullity. I do not, therefore, see that the claim against the bank has any connection with that against the gas company.

Nor do I perceive in the complaint any claim of the plaintiff of which the several claims against the defendants are parts or branches. So far as it may be the right to obtain a delivery of the certificate from the bank, the refusal of the gas company to recognize the plaintiff is immaterial. There is no claim to obtain title or possession of which it is averred the plaintiff has been wrongfully deprived. The complaint shows that both are perfect in plaintiff. The claims are several in their nature, and have no bearing upon a common subject-matter, unless it be that of possession or title, and for neither of these is the action brought. I am of opinion that the case was correctly decided below.

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Judgments and orders appealed from affirmed, with costs.

VAN VORST and FREEDMAN, JJ., concurred.

CHARLES F. WILLIS, RESPONDENT, v. WILLIAM BELLAMY, ET AL., APPELLANTS.

Specific performance—when not decreed.—Sealed contract—when evidence as to real party not admissible—Trial by jury—when demandable as of right.

Evidence to the effect that one not executing sealed contract as to real estate is the real party to the contract, is inadmissible in an action based on the contract.

In an action brought on such a contract, against one who executed it as vendor in his own name, and in his own behalf, and against others (co-defendants), claimed to be the real parties to the contract as vendors, —*Held*, the complaint should be dismissed as to the co-defendants.

Specific performance of a contract to convey a good title will not be decreed at the suit of the vendee, in case the title at the time fixed for the performance of the contract is not sound, although it may be in the power of the vendor to make it good, where the contract is such that the vendor is not, either by its express terms or implication of law, bound to corroborate or validate the imperfect title.

Under a contract which provides that the sum therein required to be deposited by the vendee should be forfeited unless the vendee complies with the contract, provided that the title to the premises sold shall be good, otherwise to be returned to the vendee, "and this contract abandoned without claim of damage for or against either party," the vendor is not bound to corroborate or validate a title imperfect at the time fixed for its performance.

In an action brought by a vendee to compel the specific performance of a contract to sell and give a good title to real estate, or in lieu thereof, if that be not practicable, for the recovery of a sum deposited under the contract, and for damages, the court, on its appearing on the trial at special term without a jury, that plaintiff was neither then, nor at the time of the commencement of the action, entitled to specific performance, cannot (a jury trial not being waived), proceed to adjudicate on either the claim for the sum deposited, or the claim for damages. These are strictly legal claims, and the court must at least direct the issues arising thereon to be sent to a jury for trial.

Respondent's points.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal by defendants from judgment entered upon findings and conclusions of judge at special term.

The plaintiff was assignee of Benjamin Willis, who had made with the defendant William Bellamy, a contract for purchase by the former, and sale by the latter, of certain real estate. The purchaser paid \$500 on the delivery of the contract. The contract was under seal.

Further facts appear in the opinion.

Burnett & Whitney, attorneys, *Henry L. Burnett* and *Edward B. Whitney*, of counsel for appellants, on the questions considered by the court, argued:—The court erred in denying the motion to compel election, and in retaining the cause at special term, and in the form of the judgment awarded. It was error to deny defendants' motions to compel plaintiff to elect between his inconsistent claims. It has always been held that a complaint plainly averring the title to be bad, is inconsistent with a prayer for specific performance (*Sternberger v. McGovern*, 56 N. Y. 12, 20; *Kerr v. Purdy*, 51 *Ib.* 629; *Emrich v. White*, 66 *How. Pr.* 154; *Nicolson v. Wordsworth*, 2 *Swanst.* 365). It was error to deny defendants' motions to compel election, for the additional particular reasons, that if plaintiff had elected to regard the title as bad, defendant, William Bellamy, was entitled to jury trial, and the other two defendants to a dismissal of the complaint. Defendants could not ask jury trial before an election should be made, because the complaint was primarily for equitable relief. They gave, however, full notice that they did not waive their right. The only demand in the complaint, based on the theory that the title was bad, was "that the defendant, William Bellamy, repay to this plaintiff the sum of \$500," &c. On this point the case must go to a jury (*Sternberger v. McGovern*, 56 N. Y. 12).

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William Settle, attorney, and *Benjamin A. Willis*, of counsel for respondent, on the questions considered by the court, argued:—The defendants' motion to dismiss the complaint as to the cause of action relating to damages, on the ground that the court had no jurisdiction to give damages, as that is a question to be tried by a jury, and defendants have demanded a jury trial, was properly overruled. It is needful only to refer to the following decisive cases: *Sternberger v. McGovern*, 56 N. Y. 12; *Phillips v. Gorman*, 17 *Ib.* 270; *Lattin v. McCarty*, 41 *Ib.* 107.

Plaintiff's recovery here is for simple advance on contract and costs of action.

BY THE COURT.—SEDGWICK, Ch. J.—The appeal is from a judgment which declares that the plaintiff has a lien upon the defendant's interest in the premises described in the complaint herein, for the money paid by his assignor on account of the purchase price, with the interest and costs, and which gave a personal judgment against all the defendants, for the amount of the money paid, &c.

The issues involved a construction of a contract for the purchase of land made by the plaintiff's assignor as vendee, and one William Bellamy, as vendor. The latter affixed his seal to the contract. The finding of the court is "that at the time of the making of said contract, the said William Bellamy was acting as the agent of his co-defendants herein, and according to the terms of the said contract, bound his co-defendants thereby." The evidence showed that the co-defendants had title, such as it was, to the land in question, and that William Bellamy had no title to it.

I do not perceive that the contract on its face binds the co-defendants; or shows that William Bellamy acted as their agent in making the contract. It is made by him solely for himself, excepting a clause that "the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assignees of the respective parties."

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This does not, if that would avail anything, refer to principals for whom he was making the contract.

The testimony of William Bellamy that in making the contract he acted as the authorized agent of his co-defendants, does not affect or change the legal quality of the act he performed in making the contract. The law is, when a contract is signed and sealed by a person for himself, and not by a principal through an agent authorized to sign and seal, the person signing for himself is liable according to the terms of the contract, and, at least in a contract for the sale and purchaser of land, his so-called principals are not liable (*Schaefer v. Henkel*, 75 N. Y. 378; *Briggs v. Partridge*, 64 *Id.* 357).

From this it follows, that there should have been no judgment against the co-defendants, either for the amount paid by plaintiff's assignor upon the purchase, or declaring that for such an amount there was a lien upon the premises in question which were owned, as has been said, by the co-defendants. In point of form, there should have been no declaration of a lien upon the interest of William Bellamy in the land, as he had no interest, and yet, for a like reason, he would not be injured by such a declaration.

Then, the issues concern only the nature of the plaintiff's claim against William Bellamy. It is a fundamental consideration that the plaintiff had the right to enforce the contract according to its terms and limitations, and was not entitled to the specific performance of any other contract than the contract as it was.

Of the \$500 paid down upon the delivery of the contract, and by the plaintiff's assignor to Bellamy, the contract declares, "the \$500 paid to be forfeited, unless the party of the second part (that is, the assignor of plaintiff), complies with the terms thereof, provided, however, that the title to said premises be good; otherwise the said \$500 to be returned by the party of the first part (that is, William Bellamy), to the party of the second

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part, and this contract abandoned without claim of damage for or against either party."

It appears that before the action, the plaintiff took the position that the title was not good, and in his complaint that the title was not then good, and the court has held, at his instance, that the title was not good.

It is not necessary to doubt that under a contract to sell and buy land, the vendee, although the title be not in fact sound, yet may bring an action to compel the vendor to make it perfect, if that be in his power. Such an action lies, because, by the legal construction of the contract, the vendor has bound himself to make the title good. If, however, the contract does not provide for a corroboration or validation of the imperfect title, then the right of the parties will have regard only to the title in the original state.

The contract in this case provides that if the title be not good, the contract is to be abandoned. As against the vendor, the plaintiff's assignor might have had the option of taking the title, but he exercised his option the other way by declaring the title defective, and from that time there remained no provision of the contract which would support an action for specific performance. The contract implies that whether or not the abandonment shall take place, is to be determined before action brought; for the vendee was certainly to take his position as to the state of the title before action could be brought, and then, if the title were not good, the contract went out of existence, excepting to give the vendee an action for the part payment he had made. This action was of a legal kind, in which the defendant Bellamy had a right to a jury trial. This right was not waived upon the trial, but was insisted upon. After such a demand, as soon as the court had found that the plaintiff had no action in equity, there should have been no adjudication as to the legal rights of the plaintiff, but the issues that regarded such legal rights, should have been sent to a jury for trial (*Black v.*

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White, 37 *Super. Ct.* 320 ; Sternberger v. McGovern, 56 *N. Y.* 12).

In truth, as the complaint took the ground that the title was bad, it appeared from the beginning that the plaintiff could, while he took such ground, claim only as in an action at law, and such an action only was in reality before the court, and the court at special term could not proceed to adjudicate as to the validity or invalidity of the title. It could only, upon objection, refuse any equitable relief, and direct that the issues be sent to a jury for trial. In that trial, there could be, for the first time, an adjudication as to the title. For that reason, it would be improper to decide as to the soundness of the objection, that the mortgage under which the title was made had never been completely assigned by the trustees who held it.

The judgment appealed from should be reversed, and a new trial ordered, with the costs of the appeal to abide the event, so far as William Bellamy is concerned.

As to the co-defendants, as the plaintiff appears to have no claim whatever against them in a mode of trial insisted upon by him, I think the judgment should be reversed, and the complaint dismissed, with costs.

VAN VORST and FREEDMAN, JJ., concurred.

CATHARINE R. ARCHER, RESPONDENT, v. THE
SIXTH AVENUE R. R. CO., APPELLANT.

Physician, examination by, on trial, of an injury to the body—When not permitted.

This action was brought to recover damages for an alleged injury to plaintiff's arm, claimed to have been caused through defendant's negligence; at the close of plaintiff's cross-examination, defendant's counsel asked permission to have a physician, who was in attendance on defendant's behalf, examine the plaintiff's arm; the permission was refused.
Held, as the court must have understood that the examination asked for

Appellant's points.

was intended to be an investigation independent of the then proceeding taking of testimony, and did not, in its form or substance, indicate otherwise than that the physician would go to the witness on the stand, and make such an examination as a physician would judge to be right and sufficient, involving probably questions to the witness, that there was no error in the refusal.

Before SEDGWICK, Ch. J., and VAN VORST, J.

Decided December 7, 1885.

Appeal by defendant from judgment entered upon verdict of jury and from an order denying motion for new trial made upon the minutes.

The action was for damages to plaintiff, for injuries to her received in falling from a car of defendant, and caused, as alleged, by the negligence of defendant's servant.

Further facts appear in the opinion.

D. M. Porter, attorney and of counsel for appellant, argued:—After the plaintiff had completed her testimony in chief, and at the end of her cross-examination, but before the defendant's counsel had relinquished his right to further cross-examination, the following took place: Counsel for the defendant asked permission to have Dr. Ranney, a physician in attendance on the part of the defendant, examine the plaintiff's arm. The court refused the permission, and defendant's counsel excepted. The refusal was error. The plaintiff had testified that she was still suffering; that her wrist was inflamed; her conduct in respect to her alleged injury had been very suspicious; she had this evidence in her possession—that is, whether her wrist was then inflamed; and there would be no immodesty in its production (any more than if she claimed her face had been injured, and covered it with her veil), and the court was bound to require its production, as much as if she had had a paper containing competent evidence bearing upon the merits, and refused to produce it while it was in her possession on the witness stand. There was no other objection taken, except that

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it was too late, and this waived all others, if any other there can be which does not appear. The contest has not been whether a party can be compelled to exhibit an alleged injury at the trial, but whether it could be compelled before trial ; nor is it necessary to decide whether an immodest exposure of the person could be ordered, because there is no such question presented on this appeal.

The cases of *Mulhado v. Brooklyn City R. Co.*, 30 *N.Y.* 370 ; *Hiller v. Village of Sharon Springs*, 28 *Hun.* 344 ; *State v. Garrett*, 71 *N. C.* 85 ; *Commonwealth v. Twitchell*, 1 *Brews. Penn.* 551, sustain the position that this ruling was error.

Chauncey Shaffer, attorney, and of counsel for respondent, argued :—The court properly refused the permission asked for by defendant to have Dr. Ranney, a physician in attendance on the part of the defendant, examine the plaintiff's arm. 1. The court had no just right to grant a physical examination (*Williams v. Phillips*, *N. Y. Com. Pleas, Law Bull.* June '79, p. 62). 2. To say the least, it was a matter resting in the discretion of the presiding judge ; and he wisely exercised that discretion (*Reeves v. Prospect Park & Coney Island R. R. Co.* [October, 1879], 1 *Law Bull.* 91).

BY THE COURT.—SEDGWICK, Ch. J.—The plaintiff was a witness on her own behalf. At the end of her cross-examination, the counsel for defendant asked permission to have Dr. Ranney, a physician in attendance on the part of defendant, examine the plaintiff's arm. The plaintiff's counsel objected, on the ground that the application was too late. The court refused the permission or denied the application, because, if the defendant had a right to such an examination, the defendant should have applied for it before that time.

The court, from the nature of its decision, must have understood that the examination, for which permission was asked, was intended to be an investigation by the physician, to be made by him independently of the then

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proceeding taking of testimony. This understanding agreed with the form of the request. The request did not in its form or substance indicate otherwise than that the physician would go to the witness when on the stand, and make such an examination as a physician would judge to be right and sufficient, involving, probably, questions to the witness. It is unnecessary to give reasons for holding that such an examination is not a part of the trial of the issues before a jury, and that it is too late to apply for it after the trial has gone so far as it had in this instance—if, which is doubtful, the defendant would have a right to such an examination at any time.

The defendant might have asked the physician to take a position near the witness' stand, and at which he could observe the arm of the witness if she should exhibit it in response to questions, and the counsel might have asked her to show her arm, and then put questions such as were proper, under the control of the court, for the information of a physician whose opinion was about to be obtained when called as a witness. This would have been more analogous to the case of *Mulhado v. Brooklyn City R. Co.* (30 N. Y. 370), than the present case. If such a proceeding were taken, the points would be whether the questions were admissible and whether the physician should be allowed to take or keep the position near the witness. Anything more than this would not be permissible before the jury. The physician would not be under oath, and if he should do or say anything that would bias the mind of the jury, the plaintiff's rights would be infringed. It is not proper now to decide more than is necessary to determine the nature of the exception in this case. It does not call for a reversal of the judgment.

The other exceptions have been examined, as well as the claim that the damages are excessive. They must be held to be insufficient.

Judgment affirmed, with costs.

VAN VORST, J., concurred.

Statement of the Case.

FRANKLIN L. NOWELL, ADMINISTRATOR, &c. v. THE MAYOR, &c., OF THE CITY OF NEW YORK.

Res gesta—Evidence as to cause of injury sufficient to carry case to jury—Contributory negligence—acting with prudence—Corporate negligence—not giving warning.

Declarations made by a party at the initiation of an act continuous in its nature, as to his intent with respect to the mode in which he purposes to do the act, are competent evidence to prove that he did it according to his expressed intention, provided the continuity of the act has not been interrupted for a space of time during which things may have happened to cause a change in the original intention. But a declaration which, for aught that appears, refers to a past transaction, is inadmissible.

Shortly before the injury, the deceased was in One Hundred and First street, and he was found in the center of that street at the foot of a wall twenty-five feet high, which abruptly changed the grade of the street, with a broken leg, and other great hurts.—*Held*, sufficient to carry the case to the jury on the question as to whether he received the injuries by falling over the wall.

There is no contributory negligence when the injured party acts with ordinary prudence, on that apprehension of danger which he is bound to have under the circumstances, and those appearances of danger which the situation manifests.

Thus, when one walking along a street which has the usual conditions of streets with nothing about it to induce apprehension of danger, comes to a wall abruptly ending the street, and falls over the wall, there being no light, or anything else that might be a warning of danger,—*Held*, that the jury might find there was no contributory negligence. *Further held*, that the not placing at the abrupt ending of the street a warning as to danger, which would suffice to warn persons of ordinary prudence, was negligence on the part of the corporation.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Plaintiff's exceptions ordered to be heard at first instance at general term.

The action was for negligence, in allowing West One Hundred and First street to be graded so that part of it went to the top of a wall that retained the bank there, the

Plaintiff's points.

rest of the street going from the foot of that wall. The wall was about twenty-five feet high. The complaint alleged that the plaintiff's intestate, while walking in the street, fell from the top of the wall and was greatly wounded. In the testimony it appeared that there were no lights at the top of the wall, or any fence upon it. There was no witness of the alleged falling. At the close of plaintiff's testimony, the court dismissed the complaint, on the ground that there was no proof that the deceased had not been guilty of contributory negligence.

Further facts appear in the opinion.

Frank E. Blackwell, attorney, and of counsel for plaintiff, after citing on the question of contributory negligence, *Tolman v. Syracuse*, Bing. & N. Y. R. R. Co., 98 N. Y. 198; *Smedis v. Bklyn. & Rockaway Beach R. Co.*, 88 *Ib.* 13; *Massoth v. Del. & H. Co.*, 64 *Ib.* 524; *Weber v. N. Y. C. & H. R. R. Co.*, 58 *Ib.* 451; *Morrison, Admr. v. N. Y. C. & H. R. R. Co.*, 63 *Ib.* 643; *Dorland v. N. Y. C. & H. R. R. Co.*, 18 *Week. Dig.* 51; S. C., 19 *Ib.* 76; *McGuire v. Spence*, 91 N. Y. 303; *Weed v. Village of Balston Spa*, 76 *Ib.* 329; *Rehberg v. Mayor*, 91 *Ib.* 137; *Clifford v. Dam*, 81 *Ib.* 52; *Todd v. City of Troy*, 61 *Ib.* 506; *Brusso v. City of Buffalo*, 90 *Ib.* 679; *Bullock v. Mayor, &c.*, 1 *East. Rept'r.* 170; and *Hume v. Mayor*, 74 N. Y. 264, argued:—I. It was the duty of the city, having itself created this obstruction some three years before, to properly guard it and to warn the traveler of his danger (*Brusso v. City of Buffalo*, 90 N. Y. 679).

II. The remarks made by deceased to his son at the cars down town, and that to his daughter in One Hundred and First street, were improperly excluded. It will be noticed that the words sought to be proved were contemporaneous with the act done, and explanatory of it. They were not the relation of a passed transaction. They were, therefore, not within some of the cases which hold this kind of evidence objectionable. Such a statement was permitted in *Dorland v. N. Y.*

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C. & H. R. R. Co., 19 *Week. Dig.* 51; 18 *Ib.* 76; Insurance Co. v. Mosely, 8 *Wall.* 397; Waldele v. N. Y. C., &c. R. R. Co., 95 *N. Y.* 274; Thompson v. Trevanion, *Skinner*, 402; Averson v. Kinnard, 6 *East*, 197; McKing v. Foster, 6 *Carr. & Payne*; Commonwealth v. Pike, 3 *Cush.* 181; Rawson v. Haigh, 2 *Bingh.* 99; Hanover R. Co. v. Coyle, 55 *Penn. St.* 402; Beaver v. Taylor, 1 *Wall.* 637). Immediately upon hearing a groan, Simpson, being but a few steps away from the foot of the wall, went to the deceased. It is fair to presume, from the evidence, that the groan was simultaneous with the fall. Simpson had reached a point near the wall long before the deceased fell. At that moment the deceased made a statement, explanatory of his condition, which was excluded. If the groan and the striking of the ground by deceased were simultaneous, then what passed between him and Simpson was within several seconds of the time of the fall, and what the former said at that time was competent evidence as part of the *res gestæ*. (Commonwealth v. Hackett, 2 *Allen*, 137; Hanover R. R. Co. v. Coyle, 55 *Penn. St.* 396). Both the above cases are approved, and the whole question of *res gestæ* is carefully considered in Waldele v. N. Y. C. & H. R. R. Co., 95 *N. Y.* 274.

E. Henry Lacombe, counsel to the corporation, and *David J. Dean*, of counsel for defendant, on the question of contributory negligence, cited, *Cordell v. Central R. R. Co.*, 75 *N. Y.* 330; *Hale v. Smith*, 78 *Ib.* 487; *Reynolds v. N. Y. Cent. R. R. Co.*, 58 *Ib.* 248; *Becht v. Corbin*, 92 *Ib.* 658; *Hart v. Hudson River Bridge Co.*, 84 *Ib.* 56; *Riceman v. Havemeyer*, 84 *Ib.* 647; *Warner v. Central R. R.*, 44 *Ib.* 471; *Dorlon v. Mayor*, C. P. January, 1884; *Gaynor v. Old Colony R. R.*, 100 *Mass.* 208; *Murphy v. Doane*, 101 *Ib.* 466; *McGuire v. Spence*, 91 *N. Y.* 303).

BY THE COURT.—SEDGWICK, Ch. J.—The plaintiff attempted to prove that the intestate had fallen from the top of a retaining wall of the bed of New avenue. Shortly

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before the accident the intestate was visiting his daughter in her house. That house was in One Hundred and First street, between Ninth and Tenth avenues. That street went easterly to the top of the wall, and the wall was between Ninth and Eighth avenues. The daughter, as witness for plaintiff, testified that the intestate, as he left her house, said where he was going. She was then asked on the part of plaintiff, "What did he say?" The defendant objected to the question, and it was excluded. It had been proved that the intestate's dwelling was in One Hundred and Thirty-ninth street. The particular place was not proved.

It seems to me that it was competent for the plaintiff to prove that the deceased when he left the house intended to go along One Hundred and First street easterly in a direction which would bring him to the wall. His mind being, by presumption, in a condition usual with the generality of men, his intention at the time was the thing that would precede and induce his subsequent movements and their direction. And his declaration of his intention was primary evidence of what that intention was. "Declarations made at the time of the transaction, and expressive of its character, motive or object, are regarded as verbal acts indicating a present purpose and intention, and are therefore admitted in proof like any facts. So upon an inquiry as to the state of mind, sentiments or disposition of a person, at any particular period, his declarations and conversations are admissible. They are part of the *res gestæ*."

He had gone to his daughter's house, from the house of a son. On the trial, that son was asked what his father said, when he was leaving the house, as to where he was going. This question was properly excluded, because it was immaterial as to anything the father did thereafter, unless the declaration referred to his intended course from the daughter's house. But, before he left the daughter's house, too much time had passed and too many things had happened, to make his declaration

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when leaving the son's house, any evidence of what he did after leaving the daughter's house.

The deceased had been found at the foot of the wall, by a witness for plaintiff. The witness' attention was attracted, probably, by the moaning of the wounded man. He found the latter on the ground, at the foot of the wall and in the center of One Hundred and First street, which continued easterly from the foot of the wall. The plaintiff's counsel, asked the witness, "What, if anything, immediately upon reaching the man, did he say to you?" Without further explanation of the character of the answer intended to be elicited by the question, the testimony sought was hearsay. No event or act appears in testimony of which a declaration of the witness would be part. The probabilities are that the declaration, if disclosed by the answer, would show that it referred to a past event, and would be of the nature of testimony to the occurrence of that event, rather than explaining or giving character to it.

At the close of the testimony for plaintiff, the counsel for defendant moved to dismiss the complaint on three grounds: 1st. That there was no evidence of corporate negligence; 2d. That there was no evidence that falling from the wall was the cause of death; and, 3d. That there was no evidence that the plaintiff was free from contributory negligence.

The following is a sufficient statement of facts, which the plaintiff could justly claim that a jury might have found: A short time before the deceased was hurt, he was in One Hundred and First street, and he was found in the center of that street, at the foot of a wall twenty-five feet high, which abruptly changed the grade of the street. He moved from one point to the other, either by what the jury might say, was a direct, usual and more convenient way, or by one that they might find was indirect, unusual and the less convenient—the former, as they might find, calling for less exertion of mind and body. If he did take the direct way, then the jury could find, coupling infer-

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ences from the broken leg and other great hurts of the man, that he fell over the wall. It is not proper to say that the jury would be forced to this result. It was a question for them. They might consider that if the intestate received his wounds otherwise than by falling from the wall, it must have been at a point easterly, and from an unusual combination of circumstances, and that it did not appear that such circumstances had happened with no presumption of law or fact that they did happen.

On the point of contributory negligence, the argument is that as there is no proof of what occurred when the deceased reached the top of the wall and fell, if it be assumed that he fell, it cannot be said that he proved or gave testimony that the accident did not result in part from his own negligence. Of course, if there be no proof of attending circumstances, then the plaintiff fails. There may be proof, however, of these things without any direct testimony as to them. The case of *Tolman v. Syracuse, &c. R. R. Co.*, 98 N. Y. 198, is a sufficient guide here.

Contributory negligence is omitting to act with ordinary prudence either upon that apprehension of danger which by law the injured person is bound under the case to have, or upon those appearances of danger which the situation manifests. If it be true that there is no reason to apprehend danger, or if the situation manifests no appearance of danger, there can be no neglect of a duty which is based upon these things.

In the present case it appears from the testimony of the witnesses that the street on which the intestate walked had the usual conditions of a street, and there was nothing about it which would induce apprehension of danger in a passenger, especially of danger from the ending of that part of the street at the top of a wall. Then the testimony showed that there was such an absence of light upon the place of the wall in the street, or of anything that might be a warning, that the jury could have found

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that there was no appearance of danger, and hence no negligence in omitting to do otherwise than walking along the street, in a manner usual to those who go upon an unlighted street. This appeal does not make it necessary to decide whether, when the accident is the result of such a defect in the street, it is or is not necessary for the plaintiff to show a freedom from contributory negligence. It is only necessary to hold that in the facts, there was a scope which would permit the jury to find that the plaintiff was not negligent.

I cannot doubt that there was a corporate duty to give at the place of such danger on a highway, a warning as to there being a danger, which would suffice to inform persons of ordinary prudence that they should not go farther.

The plaintiff's exception are sustained, the costs of the hearing to abide the event of the new trial, which is ordered.

VAN VORST and FREEDMAN, JJ., concurred.

THE COMMERCIAL BANK OF PENNSYLVANIA,
RESPONDENT, v. ISAAC HEILBRONNER, APPELLANT.

Factor—Right of to sell claim against vendee of his principal's goods, for purchase price thereof—National bank—Right of to purchase such claim—Another action pending—when not defense.

A factor who has sold goods of his principal, guaranteed the sale, and made advances thereon, has a cause of action against the vendee, which he may sell and assign.

A national bank may purchase such a claim, if the purchase is for banking purposes; the presumption being that the bank, in making the purchase used its power for a lawful purpose, which presumption is not overcome by merely showing that the former owner of the claim transferred it.

An action pending between the principal as plaintiff and his factor, the vendee of the factor, and the parties to whom the factor had assigned his claim against his vendee, as defendants, the complaint in which

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alleged a sale by the defendant factor to the defendant vendee of divers goods of the plaintiff, at low prices; that said prices had not been paid; that the parties defendant, to whom the factor had assigned his claim against the defendant vendee, took the transfer, with full notice of plaintiff's rights as alleged in the complaint, and prayed that plaintiff be adjudged entitled to receive the sum of money due from the defendant vendee, for the goods alleged in the complaint to have been sold to him; that the transferee of the factor's claim against the defendant vendee be restrained from collecting or receiving, and defendant vendee be restrained from paying over or delivering any part of the proceeds of such goods,—is no defense to an action brought by the transferee of the factor against such vendee for the price of the goods.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal by defendant from judgment entered on verdict of jury, directed by the court in favor of plaintiff.

The action was brought for the purchase price of goods sold and delivered to defendant by a firm of Vanuxem, Wharton & Co., on a credit of sixty days. Before the sixty days had expired, Vanuxem, Wharton & Co., sold their right of action to the plaintiff, which was a national bank. The goods were sold by the firm named, as factor of one Taft and one Hubbell, guaranteeing that "all sales should be good." The firm had advanced to their principals about sixty per cent. of the value of their consignments, which included the goods in question.

It was proved that Taft had brought an action against the plaintiff herein, the defendant herein, the members of the firm of Vanuxem, Wharton & Co., and the Peconic Manufacturing Co., the complaint in which alleged that Vanuxem, Wharton & Co., sold and delivered to Heilbronner divers goods of the plaintiff at divers prices, which prices had not been paid by Heilbronner to Vanuxem, Wharton & Co., the plaintiff or otherwise; that Vanuxem, Wharton & Co. executed an assignment of the claims against Heilbronner for the prices of said goods; that plaintiff herein took said assignment with full notice "of the plaintiff's rights

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in and to all of the said goods, and in and to the said moneys due, or to become due, from the said Heilbronner, for the sale and deliveries to him as aforesaid, and not for full value or in good faith, and with notice of the fact that said Vanuxem, Wharton & Co. were the plaintiff's factors with respect to the goods so sold to said Heilbronner, and had been fully paid for all their advances and charges by plaintiff, upon his goods consigned to them, and well knowing that the said Vanuxem, Wharton & Co. were insolvent, and indebted, as aforesaid, to the plaintiff;" and prayed that the plaintiff be adjudged entitled to receive the sum of money due from Heilbronner for the goods alleged to have been sold to them; that the plaintiff in this action be restrained from collecting or receiving, and that said Heilbronner be restrained from paying over or delivering any part of the proceeds of said goods. It did not appear either that an injunction had been issued or judgment entered in that action.

Jacob Fromme, attorney, and of counsel for appellant, argued:—I. The motion to dismiss the complaint after the plaintiff rested should have been granted. The plaintiff did not prove that its assignors were the owners of the indebtedness, as alleged in the complaint. On the contrary, it showed that its assignors were merely the agents to sell on commission. The fact that, as such agents, they made advances to the owner, did not alter their relations, unless it was shown that by agreement after the advances were made they then became the owners, which was not the fact in this case, nor was it attempted to be proven. After the credit expired, although not the owners, but merely the agents, if not prohibited by the owners, Vanuxem, Wharton & Co. might have maintained an action in their own name (§ 449, Code), but that did not authorize them to sell the claim before the credit expired (*Warner v. Martin*, 11 *How. [U. S.]* 209; §§ 112, 113, *Story on Agency*, [8th ed.] 130, 131).

Appellant's points.

Buying claims was not within the power of the plaintiff. The bank, therefore, exceeded its power, and hence cannot recover (*Seneca County Bank v. Lamb*, 26 *Barb.* 598; *North River Ins. Co. v. Lawrence*, 3 *Wend.* 482; *Life & Fire Ins. Co. v. Merchants' Fire Ins. Co.*, 7 *Ib.* 31; *Bank of California v. Collins*, 7 *Hun.* 336; *U. S. R. S.* § 5136, subd. 7, 999). The case of *Gold Mining Co. v. Rocky Mountain Bank*, 96 *U. S.* 640, is not analogous.

II. The defense of another action pending is a good one. The defendant set up in that action, together with the allegation in the complaint, all such necessary facts against this plaintiff as would sustain an action for an interpleader.—1. That two persons make claim against him (Heilbronner) for the same thing. 2. That he has no beneficial interest in the thing (debt) claimed. 3. That he cannot determine, without hazard to himself, to which of the parties the debt belongs. 4. That it appears that the action at bar was brought after the supreme court action, where all interests of the parties can be adjusted without damage to any one (*Dorn v. Fox*, 61 *N. Y.* 264), and asks for affirmative relief against the plaintiff in this action, which would make this defendant the plaintiff against the plaintiff here, in the same manner as if he had brought an independent action (§ 521, Code). The defendant could not in this action come in on motion and ask to be allowed to pay the amount into court, and to substitute Taft in his place under § 820 of the Code, because he (defendant) disputed a portion of it, to wit: his offset of \$81.99. (*New England Ins. Co. v. Keller*, 20 *Week. Dig.* 482).

III. In no aspect of the case could the court direct a verdict for the plaintiff. By the testimony of Taft, it appeared that he claimed the goods and account before the credit expired; also that he revoked the agency of Vanuxem, Wharton & Co., and brought suit against them before the credit expired; how, then, could the direction be made in favor of the plaintiff? The plaintiff's assignors could not even maintain the action, because

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their authority was revoked—were even sued before the credit expired (*Sargent v. Morris*, 3 *Barn. & Ald.* 277). In no aspect of the case could Vanuxem, Wharton & Co., plaintiff's assignors, be regarded as the owners of the claim (*Beach v. Forsyth*, 14 *Barb.* [469], 503; *Fahnestock v. Bailey*, 3 *Metcalf [Ky.]* 480).

Root & Strong, attorneys, and *Theron G. Strong*, of counsel for respondent, argued:—I. The motion to dismiss the complaint, on the ground that the bank had no authority to buy the claim in question from Vanuxem, Wharton & Co., was properly denied (Subd. 7, § 5136, *U. S. R. S.*; *Gold Mining Co. v. Rocky Mt. Bank*, 96 *U. S.* 640).

II. Vanuxem, Wharton & Co., having made advances on the goods of from 60 to 75 per cent. of their value, and being factors under a *del credere* commission, had a lien to the extent of their advances, and were the proper parties to sue. *a.* Whatever rights Vanuxem, Wharton & Co. had, passed to the bank by the transfer, and the bank could therefore maintain an action if Vanuxem, Wharton & Co. could; and that they could there can be no question (*Ladd v. Arkell*, 37 *Sup. Ct.* 35). *b.* The utmost that could be claimed would be that the bank would be obliged to account to Taft for all beyond Vanuxem, Wharton & Co.'s advances.

III. The pendency of the action by Taft constitutes no defense. *a.* The mere fact that a prior suit is brought by another person against the defendant for the same thing is no defense. If the defendant admits that the amount claimed is due, he can protect himself by interpleader and payment into court. *b.* But the facts in no respect make applicable the plea of another action pending (*Dawley v. Brown*, 79 *N. Y.* 398).

BY THE COURT.—SEDGWICK, Ch. J.—The first objection to plaintiff's recovery is that Vanuxem, Wharton & Co. were not the owners of the goods sold to the defendant. It is apparent that as factors of Taft & Hubbell, they had

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a cause of action against the defendant, which in its nature was capable of transfer to plaintiff. As the firm had advanced and also guaranteed that purchasers from them would pay, it was no infringement of the principal's right to turn the claim into money, as was done. Taft & Hubbell, being indebted for advances, could not have successfully brought an action against the defendant.

Another objection was, that plaintiff was not the owner of the claim, because, being a national bank, it had no right or authority to buy claims of this kind. By sub-division 7, of section 5136, *U. S. R. S.*, it had "all such incidental power as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." It had all the faculties necessary to the purchase of any kind of property. Its bank was in Pennsylvania. It had authority to buy this claim if the purchase was for any banking purpose; for instance, to place money in New York, or elsewhere, where the defendant lived. Under such a defense as the present, the presumptions are that the bank used its power for a lawful purpose (*Farmers' Loan & Trust Co. v. Curtis*, 7 *N. Y.* 466). The unauthorized purpose is not proved by merely showing that the former owner of the claim transferred it. That shows nothing as to the purpose of the plaintiff in buying, and does not overcome the presumption referred to. This objection should not be sustained.

The action, the pendency of which was set up as a defense, was not between the same parties or for the same cause. The present claim was merely incidental to the issues of that action.

Judgment affirmed, with costs.

VAN VORST and FREEDMAN, JJ., concurred.

Appellant's points.

JOHN L. COLBY, APPELLANT, v. AUGUSTUS S. PEABODY, ET AL., RESPONDENTS.

Creditor's bill—transfer of seat in stock exchange, defendant having no other property excepting stock margin.

In an action brought by a judgment creditor to set aside a transfer of a seat in the Stock Exchange, made by the debtor to his son without valuable consideration, shortly after the beginning of the action in which the judgment was recovered, it appeared that at the time of the transfer, beside such seat, the debtor possessed an interest in stocks, viz.: a margin of the cash value of \$26,612; that the action in which the judgment was recovered was brought for \$73,000, but that by reason of a counterclaim of \$50,000 on contract, the recovery was only \$18,000. It also appeared that subsequently said margin was absorbed in the stock transaction referred to, leaving defendant without property.

Held, that the defendant could not be held insolvent at the time of the transfer; that the question whether he was guilty of fraud in parting with the property with intent to deprive plaintiff of its benefit, was a question of fact for the court below; also, that defendant had the right to show that the transfer was not induced by plaintiff's action, by proving that it was the result of determination made theretofore.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from judgment dismissing complaint, entered upon findings of the court at special term.

The action was to obtain judgment setting aside a transfer of a seat in the Stock Exchange, made by the defendant to his son, in fraud, as was averred, of the creditors of the former. The court below found, among other things, that said transfer was without valuable consideration.

Further facts appear in the opinion.

The judge directed that the complaint should be dismissed.

Stephen B. Bague, for appellant.—I. The pecuniary condition of the defendant was such that a bare state-

 Respondents' points.

ment of the facts leads the irresistible conclusion that he transferred his seat to avoid the liability to the plaintiff. The intent and motive are inferred from all the facts and circumstances of each case, the pecuniary condition of the party; the character of his business, whether precarious or not; the amount of his liabilities as compared with property. The voluntary conveyance is *prima facie* evidence of fraud, not conclusive. But the presumption of fraud can only be met by the fact that the debtor retained sufficient to pay his existing debts. There is a uniformity of decision, that a transfer under the circumstances of this case is fraudulent (*Carpenter v. Roe*, 10 N. Y. 227; 2 R. S. 127, § 4; *Seward v. Jackson*, 8 Cow. 422; *Hinde's Lessee v. Longworth*, 11 Wheat. 199; *Reade v. Livingston*, 3 Johns. Ch. 481; Stat. 13 Eliz. Ch. 5; *Twyne's Case*, 3 Coke, 80; 1 Smith L. C. 34; *Place v. Sedgwick*, 5 Otto, 3; *Coleman v. Burr*, 93 N. Y. 17). *Hinde v. Longworth* could have been used as a brief in this case. It was reversed on the sole ground that evidence to rebut the presumption of fraud was excluded. (*Bump Fraudulent Con.* 3d Ed. 23, 270 *et. seq.*).

The court is also in error in giving any weight to sustain the conveyance by proof of a previously expressed determination or promise; no court has ever given any weight to evidence of a previous promise to sustain a fraudulent conveyance where the promise was without consideration. It is a constant practice to resort to the previous promise; as a promise to convey a farm for services to be rendered (*Robinson v. Stewart*, 10 N. Y. 189; *Seward v. Jackson*, 8 Cow. 406).

Martin & Smith, A. P. Whitehead, and M. W. Devine, for Peabodys, respondents.—The burden of proof is upon plaintiff to show fraudulent intent (*Wait Fraudulent Con.* § 271; *Starin v. Kelly*, 88 N. Y. 418). It was decided before the statute that a voluntary conveyance by a person in debt at the time was not necessarily fraudulent (*Seward v. Jackson*, 8 Cow. 406; approved 63 N. Y. 76). Absence

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of consideration is held not to be enough alone to authorize judgment for plaintiff. There must be facts showing actual fraud (*Holden v. Burnham*, 63 *N. Y.* 74; *Babcock v. Eckler*, 24 *Ib.* 633; *Dygert v. Remerschneider*, 32 *Ib.* 636; *Genesee Nat. Bank v. Mead*, 92 *Ib.* 637; *Young v. Heermans*, 66 *N. Y.* 374; rev'g 5 *Hun*, 124; *Carr v. Breese*, 81 *N. Y.* 584; rev'g 18 *Hun*, 134; *Savage v. Murphy*, 34 *N. Y.* 508; *Case v. Phelps*, 39 *Ib.* 164; *Carpenter v. Roe*, 10 *Ib.* 227; *Shand v. Hanley*, 71 *Ib.* 319; *Mullen v. Wilson*, 44 *Penn.* 413, distinguished; *Lormore v. Campbell*, 60 *Barb.* 68; *Spicer v. Waters*, 65 *Barb.* 233; 19 *Wend.* 134; 445; 5 *Wend.* 661).

BY THE COURT.—SEDGWICK, Ch. J.—The counsel for appellant in this case seems to me, to make in his able argument, an error of calculation, which perhaps may be deemed to be of decisive importance. It occurs in the statement of the property owned by the debtor at the time of the assignment by him, and which is claimed to have been fraudulent. The judge below had found on competent testimony that the debtor had an interest in stocks in the shape of a margin of the cash value of \$26,612. A few days before he assigned the property in controversy to his son, the present plaintiff had begun against the debtor an action to recover about \$73,000, principal and interest. This is assumed to have been due by him at the time of transfer. The proof shows that the action made the claim. In it, besides a denial by defendant of any indebtedness to plaintiff, he interposed a counter-claim upon contract for \$50,000. The plaintiff recovered only \$18,000. Therefore, in estimating his, defendant's, means at the time of the transfer, it would not be correct to charge him more than the latter amount, instead of \$73,000. On the proof then he was not insolvent, and so the judge found.

As to whether he was to be charged with fraud in fact, for parting with the property, with the intent to deprive the plaintiff of its benefit, when he knew he was

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about to engage in a speculative, hazardous business, which, in fact, did absorb the property he owned after the assignment, it was a question of fact to be submitted to the court below, in the light of all the circumstances of the case. The defendant had a right to show to the court that the transfer was not induced by the action brought by the plaintiff a few days before, by proving that the transfer had been meditated before the action was brought, and was the result of a determination made before. If the court was satisfied that the latter condition existed, it might consider it with other facts that the plaintiff could claim were proved, like the following : The plaintiff's claims were of long standing, none being later than June, 1877. The defendant rightfully denied that the amount claimed was due, either because that amount had never been due, or because of his counterclaim for services. There was nothing to require the court to find that the defendant believed the plaintiff would recover against him, and for such a reason, or for any other reason, disclosed by the evidence, intended that the property assigned should be in the hands of his son, at a time when the speculations might leave him without property to satisfy such claim as it might turn out the plaintiff had.

The case would not justify a reversal of the judge's findings of fact.

Judgment affirmed, with costs.

VAN VORST and FREEDMAN, JJ., concurred.

Statement of the Case.

JOHN DEMAREST, RESPONDENT, v. WILLIAM
HAIDE, APPELLANT.

*Building contract—Extra work—Specification not signed or attached—
oral proof to vary—Architect's certificate—when not necessary—
Evidence.*

In an action on a building contract to recover the reasonable value of certain extra work orally ordered by defendant, it appeared that under a provision of the specifications which were not annexed to the written contract, or signed by the parties, only the *cost value* (in the absence of a special agreement) of extra work, ordered *in writing*, could be demanded; but it further appeared, that the contract signed by the parties made no reference to the specification for the agreement as to the extra work, and itself contained a provision, that "should the owner request any alteration, deviation, additions or omissions from the said contract, he shall be at liberty to do so, and the same will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation."

Held, that a recovery for such extra work on proof of reasonable value, should be upheld, under said clause in the contract.

Where it appears that the builder has substantially fulfilled his contract, though he has unintentionally been guilty of certain slight defects in performance, and that he has acted in good faith, and to the best of his ability in carrying out the contract, the refusal of the architect to give a certificate of performance is unreasonable, and the builder may recover his compensation without it.

Where the contract makes the following reference: "Agreeably to the specifications made by G. W. C., architect, and signed by the said parties and hereto annexed," and no specifications were signed or annexed, what the parties intended should be the specifications, is a subject of oral proof. Hence, the question: "State what oral alterations were made in the specification Exhibit No. 2 before the signing of the contract," is not objectionable on the ground that the specifications in contract are in writing, and all prior oral agreements are merged therein.

Where it appears that the extra work,—*e. g.*, laying a concrete floor,—was done as requested by the defendant, it is not error to refuse to permit him to show that he protested against the work as insufficient during its progress.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided December 7, 1885.

Appellant's points.

Appeal by defendant from judgment entered upon the report of referee.

The action was on a building contract for the value of materials and labor furnished by plaintiff while building, for defendant, a house.

The referee found that the printed specifications referred to in the opinion, and admitted in evidence, were submitted by the defendant to the plaintiff for estimates, and that it was then agreed between the parties, by parol, that they should be, and they then were modified in certain particulars. The contract contained the usual provision requiring an architect's certificate to be obtained by the builder prior to demanding payment, etc. Further facts appear in the opinion.

William J. Amend and *Lewis Sanders*, for appellant.

—I. Under the contract, without special agreement, plaintiff could only recover cost price. There was no special agreement proved, nor cost price. How can plaintiff sustain his judgment for the concrete and sixth story?

II. Where the plans and specifications are mentioned in the contract as annexed, it is sufficient to identify them though not in fact annexed (*N. E. Iron Co. v. Gilbert El. R. R.*, 91 *N. Y.* 164). Here the plaintiff proved the plans and specifications.

III. It is only where the refusal of the architect is unreasonable that the court can step in and certify the fact in his stead. Where the contractor omitted to put a sink at a cost of \$100, the whole contract price being a little less than \$3,000, no architect's certificate was obtained as required. Held, the contractor could not recover. Occupation not an acceptance or waiver (*Reed v. Board of Education*, 4 *Abb. Dec.* 24). Certificate of architect conclusive on the owner in absence of fraud or mistake (*Wyckoff v. Meyers*, 44 *N. Y.* 143). By a parity of reasoning its refusal is conclusive on the builder. Although builder substantially completes the work so as to earn the fifth payment, yet if he then willfully aban-

Respondent's points.

done the work, leaving only some slight particulars undone, he cannot recover (*Crane v. Knubel*, 61 N. Y. 646). Here plaintiff abandoned performance as to bolting coping, fine axing sills and lintels, pier plates in cellar, circular sky-lights, and seven inches of concrete in cellar, putting in but three. He should not recover in the absence of an architect's certificate (*Wangler v. Swift*, 90 N. Y. 44). Where a party contracts to do work to the satisfaction of a third person, in an action to recover the stipulated price, he must aver and prove that the work was done to the satisfaction of such person (*Butler v. Tucker*, 24 *Wend.* 447; *Barton v. Hennann*, 11 *Abb. Pr. N. S.* 387; *Tyler v. Ames*, 6 *Lans.* 280; *McCanen v. McNulty*, 7 *Gray*, 139; *Gibson v. Cranage*, 33 *Am. Rep.* 353. See also *Bowery Natl. Bank v. Mayor*, 63 N. Y. 339; *Glacius v. Black*, 67 N. Y. 567; *Flood v. Mitchell*, 68 N. Y. 513).

IV. Plaintiff as a witness was allowed to detail six alterations which, he alleged, were agreed to orally before the signing of the contract, but which were retained in the specifications which were made a part of the written contract, under seal. No application was made to reform the agreement, but the referee found that the prior alleged oral agreement superseded the subsequent written contract. This was error.

William H. Sage, for respondent.—I. Where a building is substantially completed under a contract, the refusal of the architect to give a certificate is unreasonable, and the plaintiff can recover without it (*Nolan v. Whitney*, 88 N. Y. 648; *Thomas v. Fleury*, 26 *Ib.* 36; *Doyle v. Halpin*, 33 *Super. Ct.* 352; *Smith v. Wright*, 6 *Ib.* 694; *Whitman v. Mayor*, 21 *Hun*, 121; *Bowery Nat. Bank v. Mayor*, 63 N. Y. 336).

II. If there were any defects in the work, a deduction can be allowed therefor, and the plaintiff recover the full amount, less such damages (*Woodward v. Fuller*, 80 N. Y. 312; *Glacius v. Black*, 50 *Ib.* 153; *Johnson v. De*

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Peyster, 50 *Ib.* 666; Heckman v. Pinkney, 81 *Ib.* 213; O'Sullivan v. Connor, 8 *Week. Dig.* 61).

III. The good faith of the contractor in trying to do good work is considered as an element entitling him to recover (Ward v. Kilpatrick, 9 *Week. Dig.* 342; aff'd, 12 *Ib.* 401; Woodward v. Fuller, 80 *N. Y.* 312; Glacius v. Black, 50 *N. Y.* 153).

IV. Where extra work is, by the terms of the contract, to be ordered in writing, such work ordered orally must be paid for. The sixth story and second cellar floor were ordered orally by defendant (Am. Corrugated Iron Co. v. Eisner, 39 *Super. Ct.* 200; Smith v. Gugerty, 4 *Barb.* 614; Moody v. Smith, 70 *N. Y.* 598; Pierrepont v. Barnard, 6 *N. Y.* 279).

V. The printed parts of the specifications were no part of the contract; they were not signed, nor were they annexed to it; they are inconsistent with the contract, and were only intended to contain the particulars of the heights of the different stories, so that the plaintiff could make his estimate upon the cost of the building. In other respects the drawings guided him.

BY THE COURT.—SEDGWICK, Ch. J.—The testimony supports the findings of the referee, that the new concreting of the cellar floor was not in performance of the written contract, and was extra work, and that the plaintiff raised the walls seven feet above the height fixed by the written contract considered in connection with the drawings.

It is claimed, however, that as the extra work was not ordered in writing by the defendant, and the plaintiff did not prove the actual cost of it, but recovered its reasonable value, there could be no recovery for it, under a provision of specifications that "no bills for alterations or additions will be allowed unless the same were ordered in writing, and in default of any special agreement, extra payment is to be made only for actual cost of such alterations or additions." This provision was a part of specifi-

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cations not signed by the parties, or annexed to the written contract which they did sign, and this written contract did not refer to specifications for the agreement as to extra work, but itself contained the clause that "should the owner request any alteration, deviations, additions or omissions from the said contract, he shall be at liberty to do so, and the same will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation." This clause justified the action of the referee as regards the extra work.

The referee overruled a question asked to show that the defendant notified the person in charge of putting in the new concrete floor, that the defendant objected to it as insufficient. The exception taken to this is not material, for the referee has found on the testimony that the work was done as requested by the defendant. He could not avoid the responsibility based upon this by objecting to the work in its progress.

The referee found, upon sufficient testimony, that the plaintiff had substantially fulfilled the contract, although he had unintentionally omitted to provide and lay two cast-iron frames around the floor-lights, and he allowed the defendant the value of the frames, and the cost of laying them. The referee further found that plaintiff carried out his part of the contract in good faith, and to the best of his ability. Under these circumstances, it was unreasonable on the part of the architect to refuse to give a certificate of performance, and the plaintiff was entitled to recover without obtaining the certificate.

The plaintiff, when a witness on his own behalf on the trial, was asked, "State what oral alterations were made in the specifications, Exhibit No. 2, before the signing of the contract?" This was objected to by defendant's counsel, on the ground that the specifications in contract are in writing, and all prior oral agreements are merged therein.

This ground is not in accord with the facts of the case. The specifications referred in the written contract had no

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existence. That is, the contract made the following reference: "Agreeably to the drawings and specifications made by G. W. C. architect, and signed by the said parties and hereto annexed;" but no specifications had been signed by the parties or annexed to the contract. It was necessarily the subject of oral proof to show what the parties intended should be the specifications. On the plaintiff's proof, if the parties had been confined to the printed specifications, a contract would have been forced upon them which they had not made, and to which they had not committed themselves by any writing.

Other exceptions were taken which have been examined, and do not call for a reversal of the judgment.

Judgment affirmed, with costs.

FREEDMAN and TRUAX, JJ., concurred.

CHRISTINO S. FONDAVILA, APPELLANT, v. CHRISTIAN JOURGENSEN, RESPONDENT.

Direction of verdict, evidence justifying.—Landlord and tenant—not yielding possession—measure of damages for—Parol agreement to put in order, alleged to have been made at time of execution of lease, but not embodied therein, no recovery on.

Plaintiff (the tenant), sued defendant (the landlord), in action for damages for not delivering possession, and for breach of an agreement to put the premises in good order, alleged to have been made at the time of the execution of the written lease, but not embodied therein. The defense was a settlement of the claim. Defendant testified that negotiations were had as to the matters in difference; and that the terms of settlement were agreed on. On the day after, plaintiff sent defendant a receipt which had been prepared for him by a friend, for a certain sum of money in full for the rent for a certain period; the sum mentioned in the receipt was less than that reserved by the lease, and was the amount found by a calculation made on the basis of the terms of settlement testified to by defendant. The defendant added to the receipt the words,

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"In settlement of difference, the above amount is received," signed it and sent it to plaintiff. It did not appear that there was any difference between the parties, other than those thus existing, and which were the subject of the action. Payment was made according to the receipt. Plaintiff did not deny that negotiations were had, nor did he deny that an agreement for an allowance to him had been carried out, so far as it could then be done. Plaintiff denied that he knew of the addition to the receipt when he took it back, and in substance testified in general terms that he did not agree to settle his claim for damages. There was no evidence of the difference between the value of the premises, and the rent.

Held, a direction of a verdict for defendant on the ground that the cause of action had been settled before suit brought was correct.

Held further, there being no evidence of any difference between the value of the premises and the rent, no damages issuing out of a breach of the implied agreement to yield possession had been shown.

Held further, that the written lease was the only competent evidence of an agreement to put in order, and as the lease contained no such agreement, no damages could be recovered on such an alleged agreement.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided December 7, 1885.

The defendant, by an instrument in writing, leased certain premises to the plaintiff, at a yearly rent of \$2,500, payable monthly in advance, for a term of three years from May 1, 1884. Plaintiff sublet the upper part, at the monthly rent of \$91.66, to one Boera, who entered thereon May 1, 1884. Plaintiff paid the May rent in advance; he did not pay the June or July rent, claiming that he should have an allowance for not being put in possession of the lower part, and for a breach of agreement alleged to have been made at the execution of the lease (but not introduced therein), to put the premises in good order, painted and ready for occupation as a first-class restaurant. Negotiations were entered into, which resulted in a settlement, as defendant testified, on the following basis:—Defendant was for the month of June to allow the plaintiff the difference between the rent for that month, and the rent received by him from Boera for that month, and for the month of July one-half of such difference, and

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at the end of the term to allow for the previous May rent the difference between the two rents for that month, and to put in a new closet. On the next day, the receipt referred to in the opinion was given, and payment made according to its terms—the sum mentioned in the receipt being plaintiff's full rent for June and July, after making the above allowances for those months. Plaintiff did not deny that there were negotiations for a settlement of the difference, nor did he deny that an agreement for allowances to him was made, and that such agreement had been carried out; but near the close of his testimony he in substance testified in general terms that he did not agree to settle this claim for damages. It did not appear that there were any differences between the parties other than those thus existing, and which were the subject of the action. Other facts appear in the opinion.

The court directed a verdict for the defendant, from the judgment entered on which plaintiff appealed.

Lorenzo Ullo, for appellant.

Josiah T. Mareau, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—On April 2, 1884, the plaintiff and defendant entered into written lease, by which the defendant let, and the plaintiff hired a store at the yearly rent of \$2,500, payable monthly in advance, for three years beginning May 1, 1884. The plaintiff went into possession of the upper floor of the premises on May 1, but claimed that the defendant did not deliver possession to him of the lower part of the premises until July 15.

On the argument of the appeal, the learned counsel for appellant took the position that the action was brought to recover damages sustained by the plaintiff by reason of the failure of the defendant to deliver possession before July 15.

One of the defenses to this claim was that by mutual compromise this claim had been settled and discharged,

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by the defendant deducting from rent due and unpaid a certain amount which the plaintiff agreed should be in satisfaction of the claim he made in this action.

On the trial, the judge held that the evidence showed that such a settlement had been made, and directed a verdict for the defendant. The plaintiff asked to go to the jury on the question whether or not the agreement between the parties comprehended the claim made in this action, and did not ask that any other question be sent to the jury.

The most important piece of evidence to show that the claim had been settled was a receipt given by defendant, as follows: "Received this July 17, 1884, from Christino S. Fondevila the sum of \$241.66, being in full balance of rent of premises at 100 Maiden Lane, leased by me to him, for months of June and July, 1884. In settlement of difference, the above amount is received. C. Jourgensen." The plaintiff denied that at the time he took back the receipt after it was signed, he knew that the last sentence had been added to it, by the defendant. The proof showed that the defendant did add it. But the rest of the receipt was understood by the plaintiff. It had been prepared for him by a friend, and he, the plaintiff, had handed it to the defendant for signature. The intrinsic nature of the transaction, as described by the receipt, in light of other facts proven by undoubted testimony, shows that the settlement was made. The only reason the plaintiff had for urging a deduction from the rent was that he had not been put in possession of all the premises. If he had not made such a claim, the whole rent would have been undoubtedly due. His right would have been to recover his damages, and his obligation to pay the rent (*Knox v. Hexter*, 71 N. Y. 461). The receipt as prepared and retained by him showed that he had accepted an acquittance for part of the rent, and the only consideration for this, that the circumstances permit, was his acquittance of the defendant from the damages claimed in this action. The ruling below should be sustained.

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In fact, however, it appears in the testimony that the plaintiff did not show himself entitled to any damages in his avowed cause of action. The measure of damages upon an implied agreement of a lessor to yield to the lessee possession of the premises, is the difference between the yearly value of the premises and the rent (*Trull v. Granger*, 8 N. Y. 115). No such difference was attempted to be proved.

There was involved in the transaction between the parties, a promise, testified to by plaintiff and denied by the defendant, that the latter would before the commencement of the term put the premises in good order, &c. The complaint avers that this promise was made when the parties made the written agreement. This agreement does not show any such promise, and the promise, if made, must have been verbal. The only competent evidence of the agreement of the parties, was the written instrument (*Cleeves v. Willoughby*, 7 Hill, 83).

Judgment affirmed, with costs.

FREEDMAN, J., concurred.

ALFRED LISTER, ET AL., RESPONDENTS, v. LOUIS WINDMULLER, ET AL., APPELLANTS.

Contract—meeting of minds on subject of—Unilateral mistake, effect of—Warranty by exhibition of sample—Measure of damages, vendor no title—Breach of contract to deliver in presenti, time of—Error on trial, curing of.

Where the subject of the contract is plainly described in the agreement signed by the parties, the agreement is of itself the best evidence of meeting of minds and assent, and, in the absence of fraud or mutual mistake, is conclusive.

Where the mistake is that of one party alone, the rule of law is that whatever his real intention may be, if he manifests an intention to another party so as to induce that other party to act on it in making a contract, he will be estopped from denying that the intention as manifested was

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his real intention, and cannot avoid the contract on the ground of mistake.

Where a sale is made by sample, the possession of the sample by the seller is constructively sufficient possession of the bulk of goods from which the samples are represented to be drawn, to authorize the purchaser, in the absence of any evidence to the contrary, to believe and act on this belief, that the vendee was actually in possession of the bulk; and is sufficient to raise by implication a warranty of title to the bulk in the vendor. Want of actual possession of the bulk is in such case, as between the vendor and vendee, immaterial.

The measure of damages against the vendor for breach of contract of sale of personal property, the vendor in fact having no title to the property sold, but making the sale innocently, is the difference between the contract price and the value at the time of breach.

The time of breach of contract of sale and delivery *in presenti*, is, as against the vendor, when there is either an absolute refusal to deliver, or a distinct announcement of an inability to deliver.

Error in exclusion of evidence is cured by the subsequent admission of evidence on the same point offered by the party against whom the error was committed.

Before SEDGWICK, Ch. J., and VAN VORST, J.

Decided December 7, 1885.

Appeal from judgment entered on the verdict of a jury in favor of plaintiff against defendants, and from an order denying a motion for a new trial.

The facts appear in the opinion.

Francis Lawton, attorney and of counsel for appellants, argued:—I. It was error to rule out the testimony offered to show that the subject-matter contemplated by the parties did not exist, and that therefore the minds did not meet (*Cutts v. Guild*, 57 N. Y. 234; *Dana v. Munro*, 38 Barb. 528; *Baldwin v. Middleberger*, 2 Hall, 176; *Saltus v. Pruyn*, 18 How. Pr. 512; *Scrantova v. Booth*, 29 Barb. 171; *Booth v. Bierce*, 38 N. Y. 463; *Fullerton v. Dalton*, 58 Barb. 236; *Crowe v. Lewin*, 95 N. Y. 423; *Benjamin Sales*, 4 Am. Ed. § 50; *Thornton v. Kempster*, 5 Taunt. 786; and *Story Sales*, §§ 147-150). Even if the minds had met upon the thing described and intended to be sold, it was not acted upon. This action could not be upheld

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in such case unless there was fraud or a covenant of warranty of title (*Day v. Nason*, 1 *East. Rep.* 772; *Scranton v. Clarke*, 39 *Barb.* 275; *Hopkins v. Grinnell*, 28 *Id.* 537; *Robinson v. Anderton*, *Peake*, 94; *Early v. Garrett*, 9 *B. & C.* 932). No fraud is alleged or shown. No express warranty of title is alleged or shown, and defendants had no title nor possession of the goods in question personally, or by agent. No warranty is therefore implied (*Benj. Sales*, 4 *Am. Ed.* § 641, and note; *Scranton v. Clarke*, 39 *N. Y.* 222; *Hopkins v. Grinnell*, 28 *Barb.* 532; *Burt v. Dewey*, 40 *N. Y.* 483; *Story Sales*, 3d *Ed.* p. 459; *Bechet v. Smithers*, 50 *Super. Ct.* 381; *McCoy v. Archer*, 3 *Barb.* 323; *Edick v. Crim*, 10 *Id.* 445; *Mills v. Porter*, 5 *T. & C.* 65; *Bishop Contr.* 96; *Scranton v. Clarke*, 39 *Barb.* 275; *Sweetman v. Prince*, 26 *N. Y.* 230; 2 *Kent Comm.* 478; 1 *Parsons Contr.* 5 *Ed.* 575; *Reynolds v. Roberts*, *East*, 749).

II. The court erred in instructing the jury, that the measure of damages was the difference between the contract price and the market price of the goods mentioned in the contract during the month of May, after the breach of the contract had occurred. Damages, if any, should have been nominal. On sales of specific ascertained pieces of property damages divide into three classes : 1. Where buyer acquires the ownership of the thing sold. In such cases its increase belongs to him, and his damage on seller's failure to deliver, is its value at the time of failure. 2. Where buyer acquires no ownership by reason of seller's deceit. In such cases profits and increase which buyer would have received if the contract had been lived up to as made, are charged as punitive damages. 3. Where buyer acquires no ownership by reason of innocent failure of title in the seller. In such cases buyer's loss is complete when the ineffectual contract is made, and the price then paid is the measure of his damages (*Day v. Nason*, 1 *East. Rep.* 772; *Pumpelly v. Phelps*, 40 *N. Y.* 74; *Scranton v. Clarke*, 39 *Id.* 224; *Conger v. Weaver*, 20 *Id.* 144). The foregoing rules apply to sales of the class

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named, whether with or without warranty ; whether of realty or personalty ; whether executed or executory. 1. Sales with and without warranty : In case of warranties for quiet enjoyment and failure of title : The price agreed upon by the parties is taken as conclusive evidence of the value of the land (*Kelly v. Dutch Church*, 2 *Hill*, 116 ; *Kinney v. Watts*, 14 *Wend.* 38). If nothing is paid, he recovers nominal damages for the breach. Where there is no warranty but a mere naked agreement to convey, the amount paid is also recovered back, but upon the theory of money had and received, or placing the parties as they were. If nothing is paid, there is then not even nominal damages (*Baldwin v. Munro*, 2 *Wend.* 407 ; *Mack v. Patchin*, 42 *N. Y.* 175 ; 3 *Caines*, 118 ; *Scranton v. Clarke*, 39 *N. Y.* 224). 2. Executed and executory sales : The foregoing rules are applied to contracts to sell *in futuro* by analogy to covenants of title in executed sales (*Peters v. McKeon*, 4 *Den.* 546 ; *Conger v. Weaver*, 20 *N. Y.* 144, and cases below). 3. Sales of realty and personalty : KENT, Ch. J., lays down the rule in a case of warranty, as follows : "In warranties upon a sale of chattels the law is the same as upon the sale of lands, and the buyer recovers back only the original price" (*Staats v. Exrs. of Ten Eyck*, 3 *Caines*, 113). This rule is usually applied in the books in general terms to all cases of failure of title without fraud, irrespective of warranty. And it seems to have been uniformly followed in cases of personal property (*Armstrong v. Percy*, 5 *Wend.* 535 ; *Case v. Hill*, 24 *Id.* 102 ; *Hopkins v. Grinnell*, *supra* ; *Burt v. Dewey*, *supra* ; *Atkins v. Hosley*, 3 *T. & C.* 327 ; *Converse v. Miner*, 21 *Hun.* 367 ; *Rawle on Cov.* 4 Ed. 242), and of real estate (*Cockroft v. N. Y. & N. H. R. R.*, 69 *N. Y.* 201, and many cases cited). The case of *Shepherd v. Hampton*, 3 *Wheat.* 200 ; *Douglas v. McAllister*, 3 *Cranch*, 298 ; and *Clark v. Pinney*, 7 *Cow.* 686 ; are cases of contracts for the sale and delivery at a future time of unascertained and unidentified merchandise of given quantity and character—like stock sales on margin, and cotton futures, without

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any intention to pass title in *presenti*; and have no application to the case at bar. See also *Hopkins v. Grazebrook*, 9 B. & C. 31. It is the rules applied to covenants for quiet enjoyment that govern in actions upon failure of title in sales of chattels (*O'Brien v. Jones*, 91 N. Y. 423, and cases cited). The transaction in the case at bar was an innocent mistake, and the third general rule of damages above given applies. The breach of contract was in the failure to pass title as agreed, and the damage and right of action were complete when the ineffectual contract was signed (*Bingham v. Weiderwax*, 1 Coms. 509; *Dusenbery v. Callahan*, 8 Hun, 543). And further, the goods were demanded and not delivered and the reason given several times before May 21. MARSHALL, Ch. J., says in such a case: "I can find no principle which in a case of plain mistake with respect to title will permit the damages to grow after the contract has been broken" (*Letcher v. Woodson*, 1 Brock.). In the case at bar the contract was signed May 9. Damages could not increase after that time. They are measured by the price paid. Nothing having been paid, plaintiff's damages, even in case of warranty, are nominal.

III. The court erred in ruling that defendants' evidence of market value must be confined to time of breach. Plaintiffs were allowed to show market value up to the end of May. Defendants were entitled to same ruling.

IV. The cases cited to the contrary by plaintiff, *Dana v. Fiedler*, *Cahen v. Platt*, *McKnight v. Dunlap*, are cases of valid contracts to sell and deliver unidentified and unspecified quantities of merchandise at a future time; *Havemeyer v. Cunningham* is a case where plaintiffs acquired the ownership of the goods and defendant failed to deliver. The case of *Mack v. Patchin*, 42 N. Y. 167, was decided on the ground of defendant's bad faith, and in that and all the cases there cited, which might seem contrary to the foregoing, the seller had either knowingly sold what he had not, or refused to deliver what he had conveyed by valid sale. None of these cases have any

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application to a case of innocent failure of title upon the sale *in presenti* of a specific ascertained chattel like the one at bar.

Edward H. Hobbs, attorney, and of counsel, and *Benjamin S. Harmon*, of counsel for respondents, argued : —I. The alleged mistake upon the part of defendants is not one which will be relieved against in equity (1 *Story's Eq. Jur.* § 151, 12 ed.). The mistake here antedates the making of the contract ; it consisted, not in naming one thing when another was intended, but in naming a thing under a mistaken supposition as to its ownership, and mere mistaken calculation is never ground for equitable relief (1 *Story's Eq. Jur.* §§ 138, *h* and *i* ; *Segur v. Pingley*, 11 *Conn.* 134). When a party by reason of his own want of care has lost his remedy at law, equity does not interfere (*Marvin v. Bennett*, 26 *Wend.* 169 ; *Penny v. Martin*, 4 *Johns. Ch.* 566 ; *Taylor v. Fleet*, 4 *Barb.* 95 ; *Butman v. Hussy*, 30 *Me.* 263). The mistake claimed by defendants is one which they, by reasonable diligence, could have guarded against. A contract will be rescinded upon the ground of mistake only when the parties can be, and are, put back into their original position (*Cobb v. Hatfield*, 46 *N. Y.* 533 ; *Hammond v. Pennock*, 61 *Id.* 145 ; *Smith v. Mackin*, 4 *Lans.* 41). The whole gist of this action is that defendants put plaintiffs back into their original position.

II. There was an implied warranty of title on the part of defendants to the goods in question. 1. The sale being a sale by sample, of specific bags of merchandise, on store in a specified place, possession of the sample at the time and place of sale, was possession of the whole. It is the unquestioned law in both this country and England, that upon the sale of goods in the possession of the vendor, and as his own, there is an implied warranty of title (*Benj. on Sales* [4th Am. ed.] §§ 961, 962 ; *Eichholz v. Banister*, 17 *C. B. N. S.* 708 ; *Burt v. Dewey*, 40 *N. Y.* 283 ; *Bennett v. Bartlett*, 6 *Cush.* 225). 2. Even if it be

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held defendants had not possession of the goods, there was a sufficient affirmation of title to constitute a warranty (2 *Benj. on Sales*, §§ 952, 958 ; *Hoe v. Sanborn*, 26 *N. Y.* 552). The principle sometimes found laid down in American text-books, to the effect that there is no warranty of title when the goods are not in possession of the vendor, must be taken with certain broad restrictions. Reference is there had to sales of the mere naked interest of those having no possession, actual or constructive (*McCoy v. Artcher*, 3 *Barb.* 323 ; *Whitney v. Heywood*, 6 *Cush.* 82, 86 ; *Huntington v. Hall*, 36 *Me.* 501). Sales by sheriffs and auctioneers are common examples (*Sheppard v. Earles*, 13 *Hun.* 651 ; *Hopkins v. Grinnell*, 28 *Barb.* 533). The New York decisions which are claimed to establish the general principle above laid down, are confessedly based upon special facts, showing the purchases to have been those in the nature of speculations, either with knowledge on the part of the vendees that the articles were in the possession of others (*Edick v. Crim*, 10 *Barb.* 445), or for a price, or under circumstances, showing that purchasers were buying at their own hazard, with no affirmations of ownership on part of the vendors (*McCoy v. Artcher*, 3 *Barb.* 323 ; *Scranton v. Clark*, 39 *N. Y.* 220). The case of *Cutts v. Guild*, 57 *N. Y.* 229, cited by appellant to support the proposition that the minds of the parties did not meet, was a case where both parties meant to deal with a certain kind of judgment, but in fact, a different judgment was disposed of. *Crowe v. Lewin*, 95 *N. Y.*, so far as it is applicable, supports the respondents' position.

III. There was a breach of the contract on the part of defendants by reason of non-delivery. 1. No time of performance being specified, the law implies that it shall be within a reasonable time (*Terwilliger v. Knapp*, 2 *E. D. S.* 86 ; *Jones v. Folwer*, 37 *How. Pr.* 104). 2. Even if a reasonable time had not elapsed, plaintiffs were at liberty to treat the contract as broken ; since if one is bound to perform a future contract, but, before the time for its

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performance, declares his inability or disinclination to perform, a breach arises, *eo instanti* (Anderson v. Sherwood, 56 Barb. 66 ; Burtis v. Thompson, 42 N. Y. 426). Between May 9, the date of the contract, and May 21, the assumed date of breach, plaintiffs several times demanded the goods, but were as often informed by defendants that they had been mistaken as to the ownership of the goods, and would be unable to deliver.

IV. There was no error in the estimate of damages. The measure of damages was correctly taken to be the difference between the contract price and the value of the goods at the time the contract was broken (Dana v. Fiedler, 12 N. Y. 40 ; Cahen v. Platt, 69 Ib. 348 ; Havemeyer v. Cunningham, 35 Barb. 315 ; McKnight v. Dunlop, 5 N. Y. 537).

V. Appellant cites many cases as to the rules applicable to realty. The distinction between those rules and those to be applied upon default of title in sales of personalty, is recognized in all the books (Pumpelly v. Phelps, 40 N. Y. 59 ; Mack v. Patchin, 42 Ib. 167 ; Clark v. Pinney, 7 Cow. 681 ; Shannon v. Comstock, 21 Wend. 457 ; Gregory v. McDowell, 8 Wend. 435 ; Hopkins v. Lee, 6 Wheat. 109 ; Peters v. McKeon, 4 Den. 546 ; Baldwin v. Munn, 2 Wend. 396).

BY THE COURT.—VAN VORST, J.—In this case the defendants seek to avoid liability for a failure to deliver personal property, in pursuance of an alleged sale thereof to the plaintiffs, upon the ground that they were not the owners thereof, and had no authority to sell it, and that the sale was made through a mistake on their part, as to the identity of the article.

The sale was made through a broker who represented the defendants, and who delivered to the parties respectively a bought and sold note. But the defendants distinctly ratified the transaction by writing their approval thereof on the note. The contracts of sale described the subject thereof as follows : "Fourteen hundred and six

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(1406) bags (more or less) soft red blood, in usual good order and condition, like sample, to be delivered from Lawrence & Co.'s stores, foot of Water street." The agreement for the sale was made on the 9th day of May, 1883. At that time, the defendant, in fact, had no such merchandise for sale as is described in the contract. They neither owned themselves, nor had they any authority from others, to sell such merchandise.

"Soft red blood" is an ammoniacal preparation well known in commerce. It is used as a fertilizer. At the time of this sale, the defendants had 1406 bags of an ammoniacal preparation called "burnt leather," for sale, on account of the Park Bank. It was stored in Lawrence & Co.'s warehouse. In the same warehouse in which the "burnt leather" was stored, there were 1900 bags of "soft red blood," belonging to the Manhattan Bank. With this latter article the defendants had nothing to do.

The Park Bank instructed the defendants to sell the 1406 bags of ammoniacal material belonging to them, and they placed the matter in the hands of their broker, who, through some mistake, drew samples from the merchandise of the Manhattan Bank, instead of that belonging to the Park Bank. The samples were drawn from the bags of "soft red blood." The broker exhibited these samples to the plaintiff, who purchased the quantity mentioned in the contract, at \$2.50 per ton. The purchase was made by the plaintiffs in good faith. They needed the article which the sample exhibited to them represented.

The plaintiffs, shortly after the delivery of the bought and sold notes, demanded the merchandise, and failing to secure it, towards the close of the month, purchased in the market a quantity of it, at an advance over and above the price named in the contract.

There was evidence offered, and received, upon the trial, that the market value of this description of merchandise advanced, during the month of May, after the contract of sale was made.

It is argued by the learned counsel for the appellants

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that no valid contract of sale was made, that the subject-matter of the sale, 1406 bags, etc., "like the sample shown," did not exist—that the minds of the party did meet.

It is not necessary to question the proposition that assent is indispensable to the validity of a contract. There is no sale, unless the minds of the parties agree as to the subject-matter thereof. There is no evidence that the minds of these parties were not in accord as to the subject-matter of this sale. The defendants' brokers offered to the plaintiffs samples of a particular kind and character of merchandise, distinct and peculiar. The plaintiffs needed in their business such merchandise, and they accepted the proposition to purchase it. The terms were agreed upon. The subject-matter of the sale was exactly described in the written contract, which the defendants themselves, having read, approved. Can it be claimed that they did not mean to sell 1406 bags "soft red blood" when they signed the contract? The papers distinctly advised them not only as to what the plaintiffs had agreed to buy, but also what they proposed to sell. Their minds, therefore, agreed as to the identity of the subject-matter.

In the absence of fraud, or of a mutual mistake, an agreement, signed by the parties, where the subject of the sale is plainly described, is of itself the best evidence of assent. Where the words are ambiguous, or may be taken in a different sense, by the parties, parol evidence might be allowed, as to the sense in which they were understood by the parties. But none of these elements exist in this case. Between the parties the transaction was honest, and each understood the contract as it expressed itself. We are not to overlook that fact.

Had the subject-matter been described differently in the two notes, then there would have been no assent.

In the case of *Thornton v. Kempton* (5 *Taunt.* 786), cited among others by the appellants' counsel, the broker, who represented both parties, negotiated a sale, but by

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mistake described the subject of the sale differently in the bought and sold note. There was no assent. The case of *Cutts v. Guild* (57 N. Y. 229), also cited by appellants' counsel, illustrates a case of fraud, or mutual mistake as to the subject-matter.

In this case, the defendants, relying upon the representations and action of their broker, believed that the description contained in the contract, which they distinctly approved, covered the merchandise belonging to the Park Bank, which they had been authorized to sell. But of the defendants' belief or intentions in this regard, other than is expressed in the written contract, the plaintiffs were entirely ignorant. They contracted upon the faith of the samples, and the description of the subject matter, as prepared by their broker. Upon these facts they were justified in relying. The law regards only expressions of intention which are communicated, in determining the validity of contracts. When the mistake is that of one party alone, the rule of law is, that whatever a man's real intention may be, if he manifests an intention to another party so as to induce that other party to act upon it, in making a contract, he will be estopped from denying that the intention, as manifested, was his real intention (*Benj. Sales*, § 55, and cases cited in note).

It is also argued by the counsel for the appellants, that the defendants had neither title nor possession of the goods in question, that there was no warranty of title, express or implied, and that having no title, and not being authorized to sell the property in question, they could not give a title. The subject of an implied warranty, in the absence of one that is express, upon the sale of personal property, has been much discussed in the courts. The question has, however, chiefly arisen between the purchaser from a person without title, where the former has been sued by the true owner for its conversion. Such was the case of *Burt v. Dewey* (40 N. Y. 283), where a stolen horse had been sold. In that case, the rule was stated, that when a vendor at the time of sale was in

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possession, a warranty of title is implied. The legal question in that case was, however, one of damages. In *O'Brien v. Jones* (91 N. Y. 193), there was evidence of express warranty. In the early case, *McCoy v. Quackenbon* (3 Barb. 323), it is stated, Judge AMASA J. PARKER writing the opinion of the court, "that upon this point, there has been some conflict of opinion, and the question *not being judicially settled in this state*, it is necessary to give it a careful examination." From such examination the result reached by the court was, "the possession of a chattel by a vendor is equivalent to an affirmation of title, and in such case the vendor is to be held to an implied warranty of title, but if the property sold be, at the time of the sale, in the possession of a third person, no warranty of title will be implied." In another part of the opinion, the judge says, "the intent and understanding of the parties must be sought from all the circumstances of the transaction." In the case last cited, the action was to recover for a breach of a warranty of title on the sale of a promissory note, which was not at the time of sale in the possession of the vendors. The plaintiff failed in the end to recover, for it distinctly appeared that there were circumstances showing that the plaintiff had been advised before he purchased, of the vendor's doubts about his property in the note, and that he purchased the "note at his own risk." Under such circumstances there could have been no implied warranty.

In the case under consideration, the defendants' broker had in his possession the samples represented to be drawn from the bulk of the merchandise described in the contract of sale. These samples stood in the place of the bulk. Constructively, that was a sufficient possession of the bulk, to authorize the plaintiffs to believe, and to act upon the belief, that the defendants were actually in possession of the bulk. That would be a sufficient possession to give rise to the implication of title in the defendants.

It may be, as is argued by the appellate court, that the plaintiffs could not have had a decree for a specific per-

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formance of this contract ; but an inability to get such relief affords no reason for not awarding damages in an action at law, where a cause of action at law in fact exists.

It may also be true, that the defendants, upon allegations of the mistake of their broker and themselves, could have had a rescission of the contract, but such judgment could only have been had upon indemnifying the purchasers from actual loss. For he that would have equity must do equity.

The consequences of the defendants' mistake should not be borne exclusively by the vendees. If the plaintiffs have in fact sustained loss, through the defendants' mistake, the loss should fall upon the defendants.

The appellants' counsel urge that the damages should have been nominal only. In *Burt v. Dewey* (40 N. Y. 283), it was held in substance, that where no damages had been actually sustained, the recovery of damages should be nominal.

The learned judge, upon the trial of this action, limited the damages to the difference between the market value of the merchandise during the month after the breach, and the price fixed by the contract. Under the evidence, that direction truly measured the plaintiffs' loss, and nothing more. Several demands were made by the plaintiffs upon the defendants for the merchandise. A written demand was finally made on May 21. Then, at least, it was distinctly announced to the plaintiffs, that a mistake had occurred, and that the merchandise could not be delivered. After that, as already stated, the plaintiffs purchased from others, at the market value, which was in excess of the price fixed by the contract. In June following, the defendants tendered the merchandise described in the contract, but such tender came too late, and was properly refused.

We have looked with care over all the exceptions taken by the appellants' counsel during the trial, and do not find that either of them can be sustained.

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The case appears to have been well and considerably tried by the learned judge. We do not think that the defendants, upon the whole case, can well complain of the rulings.

There was, however, one ruling, which at first blush appeared to be erroneous, growing out of the disposition made of the defendants' offer to prove that "the value of the particular bags of soft blood," mentioned in the contract, the market value during the whole month of May, was not greater than \$2.50 per ton. The judge denied the offer and request, upon the ground that the "contract fixes the price." It is true that it was not proper to prove the market value as it existed on the day the contract was made, but it was material to show what such value was after the breach, during the rest of the month. But whatever injury the defendants sustained by this ruling, was completely repaired afterwards, for evidence was allowed to be given upon the precise point by the defendants.

In the end, there was a conflict as to the market value of the merchandise, after the breach.

There seemed to be two grades of this merchandise, one of which was "prime quality." The defendants claimed that the article described in the contract, according to the samples, was of an inferior grade.

One of the defendants testified that he was familiar with the prices of these goods, in May, 1883. He said: "there was a difference of about ten per cent. in the market value of the goods of this sample, compared with the market value of goods of prime quality. The goods of this sample were worth about ten per cent. less than prime goods." There was other evidence of the same kind. The learned judge distinctly charged, that if the jury "believe that the goods like the sample shown to the plaintiffs," were only worth \$2.50 per ton, during the month of May, then the defendants are entitled to a verdict.

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The judgment and order appealed from are affirmed, with costs.

SEDGWICK, Ch. J., concurred.

HORACE H. CHITTENDEN, AS ASSIGNEE, &C., APPELLANT, v. ALEXANDER V. DAVIDSON, AS SHERIFF, &C., ET AL., RESPONDENTS.

Equity—Assignee for benefit of creditors—when not entitled to restrain proceedings under execution, &c., against assigned property.

An equitable action by an assignee for the benefit of creditors, to restrain the sheriff and judgment creditor from taking any proceedings under a judgment obtained in another court and the execution issued thereon, and to set aside the levy thereunder, will not lie.

The complaint contained allegations to the effect that one W. made an assignment for the benefit of creditors, which was accepted by plaintiff as assignee, and duly filed; that plaintiff thereupon took possession of the assigned property, and proceeded to make an account of the assets, which he had been unable to complete, and therefore had not filed his inventory and schedules; that it was his intention to file his bond as soon as the amount thereof could be fixed; that the day after the assignment, the sheriff defendant, by direction of his co-defendant, the judgment creditor, against the protest of plaintiff, and on notice of his claims, levied upon the assigned property under an execution issued on a judgment that day obtained in the city court, and gave notice of his intention to sell the same on the premises. It further alleged, among other things, that irreparable damage will result, as the sheriff announced that he would sell the goods at auction, by which means the full value thereof will not be obtained; that plaintiff is unable to furnish the necessary replevin bond; that he is without adequate remedy at law, and cannot perform his duties as assignee unless the court interposes; that any remedy at law which he may have, must be tardy, and its prosecution impede the execution of the trust; and the complaint prayed that the defendants be enjoined from taking any proceeding under the judgment and execution, and that the levy be set sustained.

Held, insufficient to entitle plaintiff to equitable relief, and that a demurrer thereto should be sustained.

It seems, that such a complaint fails to state any cause of action whatever.

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Before VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from judgment entered on order sustaining defendant's demurrer to plaintiff's complaint, and from said order.

The complaint alleged that on April 16, 1885, one George F. Wilson, engaged in business in New York city, made an assignment for the benefit of creditors, of the property of the limited partnership carried on under his name, and of which he was general partner, to plaintiff, which assignment was duly accepted by plaintiff, and filed in the county clerk's office April 17, 1885; that plaintiff, on the same day, took possession of the assigned property and proceeded to take an account thereof, which he had not been able to complete, and therefore had not been able to file his inventory and schedules; that when this was done and the amount of his bond could be fixed, it was his intention to file it; that the day after filing said assignment, defendant Drewson obtained a judgment in the city court of New York against plaintiff's assignor for \$1,091.76, and issued execution thereon, directing the sheriff defendant to satisfy the same out of the property of plaintiff's assignor; that on said last named day, the sheriff defendant, through his deputy, against defendant's protest and with full notice of his claim, levied upon the assigned property in plaintiff's possession, and gave notice of his intention to sell the same upon the premises. The complaint then proceeded:

"*Fifth.* Plaintiff further alleges that the said stock of buttons, laces, braids, combs and notions is, as he is informed and believes from such investigation as he has been able to make, worth at least the sum of \$15,000, but he believes that care and judgment must be exercised in the sale thereof to realize such sum therefrom, or any sum approaching it. Plaintiff further alleges that a sale under the execution hereinbefore set forth, would result

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in irreparable injury and damage to the estate which he holds as assignee for the benefit of the creditors of said George F. Wilson, and would seriously and irreparably decrease the value thereof ; that the sources of plaintiff's information and the grounds of the belief upon this point are the fact that the said sheriff has announced his intention to sell the said goods at public auction, and plaintiff's knowledge that at an auction sale, under an execution, the full value of goods so sold, or anything approaching thereto, is not realized.

"*Sixth.* Plaintiff further alleges that the said George F. Wilson does not in any capacity make any claim to said property, but expressly disclaims all ownership therein or claim thereto.

"*Seventh.* Plaintiff further alleges that under said assignment he is a trustee for more than sixty creditors, representing an indebtedness of about \$25,000, whose interest is greatly imperiled by the action of the defendants already taken and the unlawful action they threaten to take.

"*Eighth.* Plaintiff further alleges that the said levy is excessive in amount, and if the defendants have any right to such property, their claim might be satisfied out of a portion only of said goods ; that while the defendant Davidson as sheriff is so in possession claiming to have levied upon the entire stock, it is impossible for the plaintiff to proceed with the execution of the trust created by said assignment ; that he cannot replevy said goods without furnishing an undertaking for their full value, which he cannot do ; that he has no adequate remedy at law, and that it is impracticable for him to perform his duties as assignee and to protect the interest of the creditors under said assignment unless the court interferes to stay the proceedings of the defendants until their right, if any they have, to sell the said property, or any portion thereof, is ascertained, and that it is for the best interest of the plaintiff, as assignee of the estate, and all creditors interested therein, that the defendant's proceedings be stayed,

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the property judiciously converted into money and held for the benefit of the parties having lawful claim thereto.

"*Ninth.* Plaintiff further alleges, that any remedy at law, which he may have against the wrong complained of, must necessarily be tardy and long postponed, and that his being remitted thereto, would unnecessarily and unjustly impede him in the execution of his trust under the said assignment.

"Wherefore plaintiff prays judgment, that the defendant, Ernst F. Drewson, and the defendant, Alexander V. Davidson, as sheriff of the city and county of New York, their agents, attorneys, deputies and servants be enjoined and restrained from taking any proceedings whatever under the said judgment, entered in favor of the said defendant Drewson, against George F. Wilson, on April 18, 1885, or upon the execution issued thereon.

"That the alleged levy, made by the defendant Davidson, as sheriff, &c., be vacated and set aside, and the property so levied upon be restored to the possession and ownership of the plaintiff, for the purpose of the trust created by the said assignment.

"That the plaintiff have such other and further order and relief as he may be entitled to, in equity and good conscience, together with costs.

James M. Townsend, Jr., for appellant.—The complaint presents a perfect cause of action for equitable relief (*High Inj.* § 119; *Wilson v. Butler*, 3 *Munf.* [*Virg.*] 364; *Boyce v. Grundy*, 3 *Pet.* 210; *Watson v. Sutherland*, 5 *Wall.* 75; 3 *Wait's Actions & Defenses*, 684).

In cases where the property is affected by a trust, a court of equity will always interfere to preserve the trust estate in specie (*High Inj.* §§ 370, 371; *Scarlett v. Hicks*, 13 *Florida*, 314).

Blumenstiel & Hirsch, for Drewson, respondent, cited *Drewson v. Am. Surety Co.*, G. T. Supr. Ct., First Dept. Oct. 1885, Opinion by DANIELS, J. (MSS.).

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W. Bourke Cochran, for the sheriff, respondent.

BY THE COURT.—VAN VORST, J.—An execution was issued to the defendant, the sheriff of the county of New York, out of the city court, on a judgment recovered in an action in favor of the defendant Drewson, against one Wilson. The sheriff, by the direction of the defendant Drewson, levied upon goods and merchandise, which Wilson had formerly owned, and which, before the recovery of the judgment against him, he had transferred to the plaintiff, as his general assignee for the benefit of his creditors.

This is an action on the equity side of the court, in which the plaintiff seeks to enjoin the sheriff from taking any proceedings whatever, under the judgment and execution in favor of the defendant Drewson, and asks that the levy be set aside. For this extraordinary relief no sufficient facts are alleged. Equity should interfere to arrest the execution of process issuing out of another court, only upon satisfactory grounds. The defendants demurred to the complaint, upon the grounds that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained.

Treated as an action for equitable relief through a perpetual injunction, restraining the sheriff from executing the process in his hands against the property of the judgment debtor, it cannot be sustained against the objection constituting the ground of demurrer. If the property levied upon did not belong to the judgment debtor, but was the property of the plaintiff as his assignee, the remedy of the latter was by a legal action to recover damages, or he could, upon giving security, have commenced an action for the claim and delivery to him of the property. The remedy afforded by law for the recovery of damages to the full extent of the plaintiff's injury, is ample.

It is only when the remedy at law is insufficient, that

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a court of equity will interpose by injunction (*High on Inj.* §§ 458, 462).

Had the complaint been of a nature to allow legal redress, and had appropriate allegations, adapted to such a cause of action, been stated in the complaint, the demurrer would not have been sustained, and such cause of action could have been tried.*

The complaint states facts upon which equitable relief only is asked. And in order that there might be no doubt as to what relief the plaintiff expected, under his facts, and that it was equitable only, he states in his complaint, that a remedy at law must be tardy, and that its prosecution would impede the execution of the trust under the assignment to him. These constitute no sufficient reasons for an action in equity.

If the plaintiff has been unjustly deprived of the possession of the goods in question, their full value can be recovered of the sheriff in an appropriate action, and with the moneys so collected, the plaintiff can proceed to the execution of his trust, so that the injury of which complaint is made is not irreparable.

Under such circumstances, equity will not restrain the execution of the process issued upon the judgment, nor a sale of the property thereunder (*Freeman on Executions*, § 437).

The complaint states no ground which would authorize a court of equity to interfere, and, in fact, no cause of action whatever.

The order from which the appeal is taken is affirmed, with costs and disbursements of the appeal.

FREEDMAN, J., concurred.

* In *Willis v. Fairchild* (51 *Super. Ct.* 405), it was held that a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, only raises the question whether or not plaintiff is, under the allegations, entitled to the relief demanded; not whether those allegations entitle him to some other relief. But see *contra*, *Mackey v. Auer*, 8 *Hun*, 183.

Respondents' points.

JENNIE THOMPSON, AS ADMINISTRATRIX, &c., APPELLANT, v. THE MAYOR, &c. OF N. Y., RESPONDENTS.

Fire department—liability of city for acts employees of.

The corporation of New York city, under the laws applicable thereto, not being the superior of the employees of the fire department in said city, is not liable for their negligent acts or omissions.

This is so, though the alleged negligent act on which the action is founded occurred while the employees of said department were engaged in testing certain apparatus,—*e. g.*, a fire tower,—prior to its purchase by the city for use in said department.

Before SEDGWICK, Ch. J., and VAN VORST, J.

Decided December 7, 1885.

Appeal by plaintiff from dismissal of the complaint a trial term, on the opening of the case.

The facts are stated in the opinion.

C. S. Spencer, and *C. R. Waterbury*, for appellant.—

I. The act alleged in the complaint was of a private character, performed for the benefit of the city, and it is therefore liable. The apparatus was to become the property of the city. The laws of 1865, chapter 249, provide that all fire apparatus, &c. shall remain the property of the mayor, &c. of the city of New York (*Consolidation Act*, § 424). The commissioners were performing an action reasonably necessary in the buying or acquiring property for the defendants, and in all matters in which they are interested, and in reference to the ownership of property the defendants must be treated as a private person or corporation (*Potter Corp.* § 455; *Dillon Mun. Corp.* 991; *Bailey v. Mayor*, 3 *Hill*, 531; *Lloyd v. Mayor*, 3 *N. Y.* 374).

E. Henry Lacombe, counsel to the corporation, and *D. J. Dean*, of counsel, for respondents.—The purchase of apparatus is as clearly within the powers conferred by

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the statute as is the extinguishment of fires ; and, therefore, the duty which the commissioners were performing, in endeavoring to ascertain the fitness of the apparatus they proposed to purchase, is as clearly within the principles which relieve the city from liability, as is the duty performed when fires are extinguished (*Edgerly v. Concord*, 59 *N. H.* ; S. C., 29 *Alb. L. J.* 291).

Even if the commissioners were engaged in the performance of an act beyond the scope of the duties prescribed by them by the statutes, and their employees were engaged therein, at the time of the occurrence of this incident, still the city would not be liable. It is clear that in such cases the commissioners, or the parties under their direction, would be acting outside the scope of public duty, and therefore upon their individual responsibility, and that liability for carelessness or negligence would extend no farther than to the person who was careless or negligent (*Smith v. City of Rochester*, 76 *N. Y.* 506).

BY THE COURT.—VAN VORST, J.—The fire commissioners, who administer the fire department, within the city of New York, were engaging in testing, with reference to a purchase thereof, by the defendant, some fire apparatus, called a "tower," in a public place known as the "Battery."

The plaintiff's husband, who was standing by, was killed by the fall of the tower.

The plaintiff, as administratrix of her late husband's estate, brings this action to recover damages for her husband's death, occasioned, as she claims, through the negligence of the defendant.

Upon the opening of the plaintiff's case, the learned judge who presided at the trial dismissed her complaint, and from the judgment upon such dismissal this appeal is taken.

That the defendants are not liable in damages for the negligence of the commissioners of the fire department, or their servants, has been repeatedly decided. Under

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the system of laws applicable to the city of New York, it is well settled that the defendants are not the superiors of the employees of the fire department, and are not liable for their negligent acts or omissions (*Maxmillian v. Mayor, &c.*, 62 *N. Y.* 160; *Ham v. City of New York*, 70 *N. Y.* 459; *Hill v. City of Boston*, 122 *Mass.* 344; 17 *Alb. L. J.* 218). In *Woodbridge v. Mayor, &c.* (49 *How. Pr.* 67), the subject was considered, and the result above expressed was reached. Cases on the subject are there cited.

The learned counsel for the plaintiff argued, however, that the fire tower was being tested only by the fire commissioners, preparatory to a purchase thereof by the defendants. But the trial judge said upon that subject: "I do not see how a distinction can be drawn between the use of a fire tower, after the title has been vested in the city, and the test of a water tower in view of its acquisition." We concur in that statement.

It is the duty of the fire commissioners to provide themselves with proper apparatus for extinguishing fires, which would involve the obligation to test the tower in advance.

A similar point was considered in *Edgerly v. Concord* (59 *N. H.*; *S. C.*, 29 *Alb. L. J.* 291); *Smith v. City of Rochester* (76 *N. Y.* 506).

The judgment is affirmed, with costs.

SEDGWICK, Ch. J., concurred.

Statement of the Case.

WILLIAM E. SMITH, JR., ET AL., RESPONDENTS, v. CONSUMER'S ICE COMPANY, APPELLANT.

This action was brought by plaintiff for an injury to a horse owned by him, caused by negligent driving of one of defendant's servants. On a review of the evidence,—*Held*, sufficient to carry the case to the jury, and to support a verdict for plaintiff.

After the judge had concluded his charge to the jury, the defendant's counsel requested him to charge further: "If you find from the evidence that the plaintiffs' driver drove his horse close to the wheel of defendant's wagon, upon nice calculations of the chances of injury, then that in itself constitutes such negligence as would prevent the plaintiffs' recovery, and entitle the defendant to a verdict,"—which request was refused. *Held*, not error; that the true question under this head was, did the action of the plaintiff's driver lead or contribute to the injury?—and this without regard to his calculations, or how nice they were; and the subject having been exhausted by the charge previously made, the instruction asked for could have answered no useful purpose.

The defendant's counsel also requested the judge to charge as follows: "If you are satisfied from the evidence that the injuries complained of were aggravated by the subsequent negligence of the plaintiff's driver in driving the horse after he was aware of the injury, this fact must be considered in mitigation of plaintiff's damages," which was refused. *Held*, not error. The injury to the horse by the passage of the wheels of the ice cart over its foot, was the destruction of the "*os corona*," and was such that it was impossible for the horse to recover; therefore the question suggested by the request was immaterial.

The damages recoverable were the value of the horse, with the surgeon and stable bills.

Before SEDGWICK, Ch. J., and VAN VORST, J.

Decided December 7, 1885.

Appeal from a judgment in favor of the plaintiffs upon the verdict of a jury, and also from an order denying a motion on the minutes for a new trial.

The action was brought to recover damages for an injury to the plaintiffs' horse, alleged to have been caused by the negligent driving by the defendant's servant of his ice wagon, over the foot of the horse. The injury

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was so severe, that it, in the end, occasioned the loss of the horse.

The defendant interposed as a defense a general denial, and alleged contributory negligence on the plaintiffs' part.

Jones Cochrane, for appellant.

Olin, Reeves & Montgomery, for respondents.

BY THE COURT.—VAN VORST, J.—Upon this appeal it has been earnestly contended by the appellant's counsel, that the case does not show that it was the defendant's wagon which did the injury complained of.

There was assuredly enough in the plaintiffs' evidence to take the case to the jury upon the question as to whether the injury was occasioned by the wheel of the defendant's ice cart.

The plaintiffs' driver testified that at the time of the collision of the two wagons, at the corner of West and Vesey streets, he was seated on his truck. He was going towards Jay street. He saw the defendant's cart approach; he says, "they started the ice cart, and ran the wheel over my horse's leg." Upon his cross-examination the witness said, "I know he" (the defendant's driver with his cart), "went behind my back strap, and it must be his wheel that passed over my horse's leg and cut it; it must have been the hind wheel; it was a wheel of the cart which ran over my horse's foot;" and he added that when the hind wheel went over the horse's foot "*he flinched.*"

Now, it appears to us that the plaintiffs' driver, from his situation on the truck, and with his observation of the movements of the defendant's driver, and the passage of the wheels of his cart behind his back strap, could not be mistaken as to the cause of his horse's "flinching." It was when the defendant's wheel passed over and crushed it. After such statement, there can be no reasonable doubt but that the jury were right when they

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decided that the injury was done by the defendant's wagon. Why speculate about other causes, when there was present an efficient cause, to do the precise injury?

Conceding the correctness of the contention of the defendant's counsel that negligence must be shown by competent proof, and not be left to conjecture, an examination of the evidence shows that there was enough therein to justify the conclusion reached by the jury, that the negligence of the defendant's servants in driving the ice cart, under the circumstances disclosed, occasioned the injury, and that there was no contributory negligence on the part of the plaintiffs' driver. Such questions in a case like the one under consideration, where a collision occurs between vehicles in a place so crowded as the one where this injury occurred, where reasonable care should be exercised by persons driving, both to avoid injury to one's self or to cause it to others, may well be left to the judgment of a jury whose verdict, when there is any reliable evidence as to the cause of the injury, is not likely to be otherwise than right.

In this case, the parties and the jury had the benefit of a carefully prepared charge by the learned judge who presided on the trial, with instructions so clear and just that the jury could not fall into error in accepting it as a guide.

The defendant, after the judge had completed his charge, asked the court to charge in these words: "If you find from the evidence, that the plaintiffs' driver drove his horses close to the wheel of the defendant's wagon upon nice calculations of the chances of injury, then that in itself constitutes such negligence as would prevent the plaintiffs' recovery, and entitle the defendant to a verdict." The court declined to charge otherwise than it had already charged. The defendant's counsel excepted. The true question under this head, which was one of contributory negligence, was, did the action of the plaintiffs' driver in conducting his vehicle on the occasion, lead or contribute to the injury? It matters not what

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his calculations were, or how nice—was he guilty of negligence? In his charge the learned judge had already fully discussed that subject, and he had distinctly called the attention of the jury not only to the effect of contributory negligence upon the plaintiffs' rights, but as to what conduct on the part of his driver would constitute such negligence. The subject was exhausted by the charge as made, and the instruction asked for could have answered no useful purpose.

The defendant's counsel also asked the judge to charge the jury as follows: "If you are satisfied from the evidence that the injuries complained of were aggravated by the subsequent negligence of the plaintiffs' driver in driving his horse after he was aware of the injury, this fact must be considered in mitigation of plaintiffs' damages." This request was properly refused by the court. The injury to the horse by the passage of the heavy wheel of the ice cart over its foot, was the destruction of the "*os corona*." It was impossible for the horse to recover, and the question suggested by the request is therefore immaterial. It was necessary that the horse, although injured, but to an extent not at once discovered, should be driven to its stable. There could be no apportionment of the damage under such conditions, even if the fact was that the plaintiffs' servant drove faster than he should have done after the injury. The damages recoverable could only be for the value of the horse, with the surgeon, and stable bills, and as the real injury which rendered the horse valueless was received through the negligence of the defendant's servants, it was entirely proper that it should compensate the plaintiffs for their loss.

As examination of the whole case discloses no error upon the trial which should lead to the reversal of the judgment. The result reached was correct, and it should not be disturbed.

The judgment and order are affirmed with costs.

SEDGWICK, Ch. J., concurred.

Statement of the Case.

JAMES KENNY, RESPONDENT, v. THE CUNARD S. S.
Co., APPELLANT.

*Negligence—Employer and employee—Fellow servant—when foreman is—
Suitable appliances.*

The plaintiff was in the hold of one of defendant's steamships, assisting in loading cargo. There were being shipped, under the direction of a foreman, some boards which, when over the hatch became loosened in the chain holding them on the tackle, and fell down the hatch and injured plaintiff, who was directly thereunder. It appearing that safe and suitable machinery had been furnished by the defendant, and that its non-use, or improper use, causing the accident, was owing to the negligence of the plaintiff's fellow servants,—*Held*, that defendant was not liable, and that the motion to dismiss the complaint should have been granted.

Where all the needed appliances in the work have been furnished by the employer through an appropriate head, he should not be made liable for mistake or error made by any workman selecting one out of two or more of such appliances, to be used in a service in which all were engaged, and in the use of which one of them may be injured.

A master is not responsible to an employee for the negligence of a competent foreman to whom there has been no delegation of power and control of the business, or a branch thereof, but who is simply charged with special duties.

With respect to corporations, which must necessarily act through agents, the rule is subject to modifications; but in all cases it makes no difference in the application of the rule, exempting the master from liability for injuries to his servants, through the acts of co-servants, that the one receiving the injury is inferior in grade, and is subject to the orders of the one by whose negligence the injury is caused, if both are engaged in the same general business, accomplishing one and same general purpose.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from the judgment entered on a verdict in favor of plaintiff, and from the order denying defendant's motion on the minutes for a new trial.

The action was to recover damages for injuries sustained by plaintiff while in the employment of defendant

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as a longshoreman, on November 27, 1882, on the steamship Catalonia.

The facts are fully stated in the opinion.

Frank D. Sturges, for appellant.

Herman H. Shook, for respondent.

BY THE COURT.—VAN VORST, J.—The plaintiff, while in the defendant's employment, assisting in loading cargo upon their vessel the Catalonia, and while in the hold of the vessel, was injured by the fall of some boards, which were being lowered by servants of the defendant down the hatchway, by means of a derrick rigged with ropes and chains, furnished by the defendant. Some of the boards, colliding with the combing of the hatchway, slipped from the fastenings while being lowered, and struck and injured the plaintiff, who was, at the time, under the hatchway.

The jury before whom the trial was had, rendered a verdict for the plaintiff, and from the judgment entered upon the verdict, this appeal is brought by the defendant, which also appeals from the order made at the close of the trial, denying the defendant's motion for a new trial.

At the close of the plaintiff's case, the defendant's counsel moved the court to dismiss the plaintiff's complaint, upon the grounds, in substance, that the plaintiff's injury "was the fault of his fellow servants," and that there was no proof of "any absence of the proper appliances for the work" in which the defendant's servants were, at the time, engaged. The motion was renewed, at the close of the case, and was denied.

The disposition of these questions must determine whether the judgment from which this appeal is taken can stand. And first, with regard to the apparatus. The learned judge, in denying the defendant's motion, properly said, "that it is the duty of the master to supply the servants appliances for the performance of the master's work which should be adequate for the immedi-

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ate occasion in question, and that, in the performance of that duty, he is bound to exercise reasonable care." In regard to the apparatus necessary to be used in the work upon which the defendant's servants were engaged upon the "immediate occasion in question," whether there should have been used "a chain nippers" in slinging and lowering the boards, or a "chain with a hook," the defendant had, beforehand, supplied both.

Both were at hand, ready for use. Wright, a witness for the plaintiff, testified as follows: "Mr. Graham was on the dock acting as foreman in regard to taking the boards in; he was at the ship's rail; he told me to hurry up and let the boards come in as quick as possible. I said to him that I wanted, when we were slinging a draft of boards, to put the chain nippers on, and he would not allow me; he told me to put the hook around. The chain nippers was the proper thing to be used for boards; *there was a chain nippers on the dock at the time.*" So that whether a chain nippers having a *ring* at the end, or a chain with a hook, was the proper apparatus for the work in question, there was no omission on the defendant's part, for both were supplied, and either could have been then used.

The other question remains to be considered: was the plaintiff's injury occasioned by the negligence of his "fellow-servants?" If it was, he could not recover, and the defendant's motion to dismiss the complaint should have been granted. On the occasion in question, the chain with the hook, and not the nippers, was used by Wright. He is not absolutely certain that the fall of the boards proceeded simply from the use of a chain with a hook instead of a ring. Wright himself testified: "I placed the hook around the chain; that is not the way it is generally done; it is not hooked in one of the slings; when used, that hook is placed around the chain and pushed up towards the load. When I placed this around the draft of boards, *I did not push it up tight to the boards*; I went away from it as soon as it went ahead, and looked out for

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myself. Graham did not say to leave it loose ; he said it would do, go ahead ; when he said that, I did not make any attempt to push the hook over towards the boards."

We need go no further in search for a cause of the slipping of the boards from the sling, as it struck the combing of the hatchway.

The action of Wright in omitting all effort to push the hook down to the boards, sufficiently accounts for the injury to the plaintiff. For the negligence of Wright in the management of the chain and hook, the defendant is not liable to the plaintiff. Wright was a fellow workman with plaintiff, engaged in the same service.

But Graham, as well as Wright, was a fellow-servant with the plaintiff. Although called a foreman, he was one of a separate gang of men distinctly engaged in the work in question. He was directing, it is true, but he was acting under a general foreman. Graham had nothing to do with supplying the apparatus or machinery for the work in question. The discharge and loading of the vessel were under the general direction of one Craven, the head stevedore, and foreman of the defendant. He had been in the defendant's service for thirty years and upwards. It was his duty to give directions with respect to the apparatus and machinery to be used in loading the vessel. In this instance, he gave directions for the rigging of the derricks, to haul the boards taken on the vessel, and through the hatch. He, and not Graham, one of the gang of workmen in question, represented the defendant distinctly in the work in which these men were engaged.

The plaintiff had been employed by Craven, and was one of this separate gang in and about this hatch. There were other gangs in other parts of the vessel.

All the needed appliances having been furnished by the defendant, through an appropriate head, it is difficult to see how they could be made liable for any mistake or error made by any workman in selecting one out of two or more slings, to be used in a service in which all were engaged, and in the use of which one of them should

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be injured. The rule is that a master is not responsible to an employee for the negligence of a competent foreman, to whom there has been no delegation of power and control of the business, or a branch thereof, but who is simply charged with special duties (*Malone v. Hathaway*, 64 N. Y. 5).

With respect to corporations, which must necessarily act through agents and representatives, the rule is subject to modifications. But in all cases, it makes no difference, in the application of the rule exempting the master from liability for injuries to his servants, through the acts of co-servants, that the one receiving the injury is inferior in grade, and is subject to the orders of the one by whose negligence the injury is caused, if both are engaged in the same general business, accomplishing one and the same general purpose (*Feltman v. England*, L. R. 2 Q. B. 33; *Lovegrove v. The London, Brighton & S. C. Ry. Co.*, 16 C. B. [N. S.] 669).

In the case before us, Graham, although called a foreman of one of several gangs, was in fact a fellow-servant of the plaintiff, under the direction of the chief stevedore Craven, and there was nothing to show that he was not a fit person for the place (*Hart v. Floating Dry Dock*, 48 *Super. Ct.* 460; *Slater v. Jewett*, 85 N. Y. 61; *Barringer v. Del. & Hudson Co.*, 19 *Hun*, 216; *Crispin v. Babbitt*, 81 N. Y. 516).

An examination of the entire evidence leads us to the conclusion that the defendant's motion to dismiss the complaint should have been granted.

The judgment appealed from is reversed, and a new trial is ordered, with costs to the appellant to abide the event.

SEDGWICK, Ch. J., and FREEDMAN, J., concurred.

Statement of the Case.

WILLIAM A. DOUGLASS, ET AL., APPELLANTS, v.
EDWARD F. WINSLOW, CHARLES BARD,
STEPHEN A. LATHROP, AND THE N. Y., ONTARIO & WEST'N R. R. CO., RESPONDENTS.

Demurrer.—Conspiracy—money had and received—conversion—what not sufficient allegations of.—Issue on demurrer—what is.

The complaint alleged that the railway company, defendant, was indebted to plaintiffs in the sum of \$65,000, subsequently reduced by payment to \$75,000; that plaintiffs were persuaded by defendant Winslow, president of the company, to confide negotiations for a settlement thereof to defendant Bard; that Bard informed plaintiffs that the company would only pay \$55,000, advising plaintiffs to accept the same or they would lose the whole claim; that Winslow corroborated Bard's statements and advice, relying upon all which, etc., plaintiffs accepted the offer and gave the company a general release; that said statements of Winslow and Bard were willfully false, and made in pursuance of a conspiracy theretofore formed among defendants to defraud plaintiffs of their balance of \$20,000, and to convert it to the use of defendants; that the company in fact allowed plaintiffs' claim in full, defendants Winslow and Bard concealing such facts from plaintiffs; that after the release was given, a voucher for said balance of \$20,000, purporting to warrant the payment thereof to plaintiffs, was prepared or caused to be prepared by defendants, was signed, approved and audited by Winslow as president, and by defendant Lathrop as auditor of the company, for their individual purposes and in pursuance of said conspiracy, etc., and its amount was by said company paid or credited to, or divided among these defendants, or some of them, without plaintiffs' knowledge or consent, and in fraud of their rights; that defendants still retain the whole of said \$20,000; that defendant corporation is insolvent, and a judgment against it worthless; and that plaintiffs have suffered damage by reason of said wrongful acts in the sum of \$20,000, for which they pray judgment.

Held, on separate demurrers by each of the defendants, that the charge of conspiracy must fail for want of an averment in a competent form, that the conspiracy or the acts done in furtherance thereof, resulted in a damage to plaintiffs.

Further held, that the complaint sets forth neither an action for money had and received for plaintiffs' use, nor one for conversion, nor an action against any particular defendant.

Whether a demurrer to the complaint should be sustained if the facts

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pleaded do not entitle the plaintiff to the *relief demanded*, irrespective of his right thereon to other relief, *quære*. *

Before VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from final judgment entered on an interlocutory judgment sustaining demurrers, and from said interlocutory judgment.

The substance of the allegations of the complaint is as follows :

The New York, Ontario and Western Railway Co. was indebted to plaintiffs in the sum of \$85,000 ; plaintiffs, having wholly failed to procure the settlement and payment of this indebtedness, after protracted and persistent efforts to that end, were persuaded by the defendant Winslow (president of said company), to confide all negotiations for such settlement to defendant Bard. After some time (plaintiffs' claim having been, by a payment on account, meanwhile reduced to \$75,000), Bard informed plaintiffs that the utmost the company would pay was \$55,000 ; and he emphasized his advice that plaintiffs should accept such settlement, by a threat that the alternative would be the probable loss of the entire claim ; thereupon plaintiffs made specific inquiry of defendant Winslow, and he corroborated Bard's statements and advice ; plaintiffs believed, and acted upon the faith of these statements and this advice ; they accepted \$55,000 of the company's notes in full settlement of their claim, and executed and delivered a general release to their debtor, the company ; that the said statements of Winslow and Bard were willfully false, and were made in pursuance of a conspiracy theretofore formed among the defendants, the ultimate object of which was to defraud plaintiffs out of this very balance of \$20,000, and to convert it to the use of the defendants ; the company did,

* Willis v. Fairchild, 51 Super. Ct. 405.

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in fact, allow plaintiffs' claim at its full amount, but the knowledge of such allowance was suppressed and concealed from plaintiffs by Winslow and Bard, and plaintiffs were given the false information aforesaid ; and, after plaintiffs had executed and delivered the general release above mentioned, a voucher for the unpaid balance of \$20,000, purporting to warrant the payment thereof to plaintiffs, was prepared by the defendants, or at their instance, was signed, approved and audited by Winslow, as president, and by Lathrop, as auditor of the company, for their individual purposes, and in pursuance of said conspiracy, &c., and its amount was, by said company, paid, or credited to, or divided among, these defendants, or some of them ; that all this was done without plaintiffs' knowledge or consent, and in fraud of their rights ; that defendants still retain the whole of the \$20,000, and plaintiffs have received none of it ; that the corporation defendant is insolvent, and a judgment against it would be worthless ; and that by reason of the wrongful acts of the defendants in the premises, plaintiffs have suffered damages in the sum of \$20,000, for which they pray judgment.

The defendants severally demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

These demurrers were sustained, under the decision and opinion of SEDGWICK, Ch. J., as follows :

"On demurrers to a complaint, the issue is not whether there are stated in the allegations of the complaint facts sufficient to make some cause of action. It is whether the complaint alleges facts sufficient to sustain the judgment demanded by the complaint. If such a demurrer be overruled, and judgment for plaintiff directed, the plaintiff can have no other kind of judgment than such as the complaint demands.

"The complaint demands a money judgment, following the averments 'that, by reason of the wrongful and fraudulent acts of defendants in the premises, plaintiffs

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have sustained loss and injury, to their damage, \$20,000.' The learned counsel for plaintiffs, on this argument, concedes that the plaintiffs are not entitled to recover as upon a breach of contract.

"The complaint avers that the defendants combined and conspired, and did certain acts in furtherance of that combination and conspiracy. To sustain the action it was necessary to aver in a competent form that the consequence of the conspiracy, or of the acts, was a damage to the plaintiffs. The complaint avers that, on, etc., 'a conspiracy or combination had been formed, and then existed, between these defendants, the ultimate end and object of which was fraudulently to obtain possession of said sum of \$20,000, the property of the plaintiffs, and to convert the same to the use of the defendants or some of them.' Let us assume that the complaint alleges that the defendants did certain acts in furtherance of the conspiracy, which tended to the accomplishment of the object of the conspiracy. There would still remain to be averred that some or all of the defendants, the conspirators, did obtain possession of plaintiffs' money, and did convert it to their, the defendants', use. If they did not, there was no damage.

"On this subject, the averments are, that, 'after the execution and delivery by plaintiffs of the receipt and general release aforesaid, and on, etc., these defendants or some of them, made, or caused or procured to be made, a voucher in the form required by said company, for the payments of money to contractors and others, purporting to warrant and justify the payment to plaintiffs of the sum of \$20,000 on account of one million yards of cubic hard-pan excavation on the line of said 'Middletown Branch;' that defendants Winslow and Lathrop, using their respective official positions aforesaid for their individual purposes, and in aid and furtherance of the ends and objects of the conspiracy or combination aforesaid, affixed their respective official signatures to the said voucher, as approving and auditing the same, and there-

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upon the said sum of \$20,000 was, by said company, paid or credited to, or divided among these defendants or some of them.'

"It is very doubtful that the complaint shows that the plaintiff was the party defrauded in this transaction and that the company was not; but the immediate and not doubtful point is that the complaint does not show that the company ever parted with any money, or that any of the defendants received money from the company for the use of the plaintiffs. It is not said that the company paid over money for the use of the plaintiffs, or even gave a credit to their use. It is consistent with the complaint that the company gave the defendants, or some of them, a certain credit; that is, have become debtors to the defendants or some of them. That fact is not damage, or cause of damage, to the plaintiffs. It has not lessened or impaired any property right of plaintiffs, or affected any cause of action that the plaintiffs might have had before the alleged crediting.

"It is conceivable that, at the time of the transaction, the company was solvent, and it may be assumed that practically the acts of the individual defendants have led to the plaintiffs being kept without knowledge of the real fact, until the company has become insolvent. The matter involved in such a supposition cannot be examined here, for the complaint does not make such a case. There is nothing equivalent to an averment, as a matter of existing fact, that the plaintiff could have collected his claim at the time when the fraudulent voucher was made, and the company credited the defendants, or some of them, with its amount. There is no room for inference from the fact of the company having \$20,000, because that amount may have been only credited. The averment on the subject is, that at the time of making the complaint, the company 'is insolvent.' This prevents an inference of an earlier insolvency—especially one extending back indefinitely.

"Of course, I do not intend to pass upon the suffi-

Appellants' points.

ciency of allegations that would make the supposed case to constitute a cause of action.

"The demurrer is sustained, with leave to amend upon payment of costs of demurrer, and in case of no amendment, judgment is ordered, dismissing complaint, with costs."

W. R. Beach, for appellants.—I. This action is maintainable under the present pleading, as an action on the case for damages resulting from a conspiracy to defraud.

II. As matter of law, we are not limited to the form of action which the pleader apparently contemplated, but may maintain the suit under any other name or form, to which the facts pleaded are appropriate, and in which we can properly claim a money judgment. A demurrer to a complaint for insufficiency can only be sustained when it appears that, admitting all the facts alleged, it presents no cause of action whatever (*Marie v. Garrison*, 83 *N. Y.* 14; *Pierson v. McCurdy*, 61 *How. Pr.* 134; *Graham v. Camman*, 13 *Ib.* 360; *People v. Mayor*, 17 *Ib.* 56; *Spear v. Downing*, 22 *Ib.* 30; *Mackey v. Auer*, 8 *Hun.* 180; *Emery v. Pease*, 20 *N. Y.* 62; *Hale v. Omaha Nat. Bank*, 49 *Ib.* 626).

III. The complaint states facts sufficient to constitute causes of action other than for damages for a conspiracy to defraud, and in which the plaintiffs are entitled to a money judgment as prayed. (1.) A cause of action for conversion may undoubtedly be maintained under the allegations of the complaint (*Gordon v. Hostetter*, 37 *N. Y.* 99; *Heine v. Anderson*, 2 *Duer.* 318; *Farrington v. Payne*, 15 *Johns.* 431; *Zabriskie v. Smith*, 13 *N. Y.* 330; *Marie v. Garrison*, 83 *Ib.* 14, 23; *Ward v. Forrest*, 20 *How. Pr.* 465; *Ladd v. Moore*, 3 *Sand.* 589; *Moses v. Walker*, 2 *Hilt.* 536; *Ward v. Forrest*, 20 *How. Pr.* 465). (2.) The complaint contains facts sufficient to constitute a cause of action for money had and received (*Long v. Russell*, 13 *J. & S.* 434; *National Trust Co. v. Gleason*, 77 *N. Y.* 400; *Horn v. Town of New Lots*, 83 *Ib.* 100).

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That the complaint sounds in tort, is no obstacle to the maintenance of the action. Plaintiffs may, if they, so elect, waive the tort and amend their prayer for relief, at the trial (*Gordon v. Hostetter*, 37 *N. Y.* 99 ; *Byxbie v. Wood*, 24 *Ib.* 607 ; *Wright v. Hooker*, 10 *Ib.* 51).

Shearman & Sterling, for respondents Bard & Winslow ; *John B. Kerr*, for respondent Lathrop ; *P. B. McLean*, for the railway company, respondent, and *Thomas G. Shearman* and *Everett P. Wheeler*, of counsel.

—I. "Where there is no answer, the judgment shall not be more favorable to the plaintiff than that demanded in the complaint" (*Code*, § 1207). Upon the argument of this appeal, therefore, the question is not whether the plaintiffs might be entitled to some relief upon the allegations of the complaint, but whether they are entitled to the relief demanded or any portion of it.

II. The only injury which the plaintiffs claim to have suffered is in their being induced by fraud to execute a release of a claim for \$85,000, in consideration of a payment of \$65,000. But a release obtained by fraud is void, as a matter of course ; and as it is distinctly charged that the railway company was a party to the scheme of fraud by which this alleged release was obtained, it is no release ; and the plaintiffs can, upon their own showing, bring an ordinary action of contract against the railway company, and recover the full amount due them, without regard to the release. A release thus utterly void cannot be made the ground of a claim for damages. No injury has been suffered ; and, therefore, no damages can be recovered (*Dung v. Parker*, 52 *N. Y.* 494 ; *Wemple v. Hildreth*, 10 *Daly*, 481 ; *Schwenk v. Naylor*, 50 *Super. Ct.* 57 ; *Post v. Lyke*, 18 *Week. Dig.* 385 ; *Taylor v. Guest*, 58 *N. Y.* 262 ; *De Graw v. Elmore*, 50 *Ib.* 1). Even if the release had been valid, yet the subsequent act of the company in making out a voucher in favor of the plaintiffs for the amount, was equivalent to a waiver of this release, and entitled them to recover upon that voucher. The

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act of the defendants Winslow and Lathrop, therefore, in making out that voucher, was a favor to the plaintiffs, instead of an injury, and cannot possibly constitute any ground for this action. The allegation that the railway company has paid to "some of the defendants" \$20,000, which it owed to the plaintiffs, is entirely immaterial. For all that appears by the complaint, the railway company has paid this money to itself; and this does not in the slightest degree bar the plaintiffs from recovering the amount. But even if the money had been paid to the other individual defendants, the case would not be altered. If A. owes B. \$20,000, he can never cancel the debt by paying it to C.; B. can sue and recover without the slightest regard to this pretended payment.

III. The complaint does not sufficiently connect the defendant Lathrop with any of the acts of the other defendants to justify his being made a defendant.

IV. The plaintiffs cannot sustain this action against the railway company upon the ground of the original debt. This action is not founded upon contract. It is expressly put upon the sole ground of fraud. The contract is stated only as matter of inducement. Even if all the facts were set forth in the complaint which would have entitled the plaintiffs to a recovery under the contract, yet they could not be allowed so to recover in this action, because the two forms of action are entirely inconsistent with each other; and the plaintiffs have elected to rely on the fraud and not on the contract (*Walter v. Bennett*, 16 N. Y. 250; *Barnes v. Quigley*, 59 *Ib.* 265; *Ross v. Mather*, 51 *Ib.* 108; *De Graw v. Elmore*, 50 *Ib.* 1). Even if the action could be treated as one founded upon contract, yet the complaint does not allege facts sufficient to sustain any claim on contract. All that it alleges is that the railway company was justly indebted to the plaintiffs in the sum of \$93,000, on account of work performed by the plaintiffs for the company, under a contract between the plaintiffs and the company in and about the construction of the company's railway. These

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are mere conclusions of law, and do not constitute a cause of action.

BY THE COURT.—FREEDMAN, J.—Although, in the opinion of the court below, the rule applicable to the determination of such demurrers as were interposed in this action, was stated perhaps in terms too broad, yet in fact the demurrers were correctly disposed of.

The charge of conspiracy must fail for want of an averment in a competent form, that the conspiracy, or the acts done in furtherance thereof, resulted in a damage to the plaintiffs.

And there being no allegation that the company paid over money *for the use of the plaintiffs*, or even gave a credit *to their use*, and the allegation that “the sum of \$20,000 was, by said company, paid or credited to, or divided among these defendants, or some of them,” being in the disjunctive and alternative, thus including the company as a defendant in the charge of having received the money or credit, or part thereof, the complaint, especially in view of the separate demurrers filed by the defendants, sets forth neither an action for money had and received for plaintiffs’ use, nor one for a conversion of plaintiffs’ money or property, nor an action against any particular defendant.

The judgments appealed from should be affirmed, with costs.

VAN VORST, J., concurred.

Appellant's points.

GEORGE D. BAREMORE, RESPONDENT, v. FREDERICK B. TAYLOR, APPELLANT.

Bill of particulars—when ordered.

The complaint contained three claims, viz.: for work, labor and service of plaintiff's assignor; for money had and received of plaintiff's assignor; for money paid, laid out, and expended by plaintiff's assignor. The answer consisted of a general denial as to each claim, and affirmative defenses; 1st. payment to plaintiff's assignor for services rendered and moneys paid out; and, 2nd, that defendant had fully accounted for any moneys had and received for plaintiff's assignor. It appeared without contradiction, that plaintiff, upon demand, had furnished defendant with a bill of particulars, and therein had given him credit for every payment known to plaintiff to exist, and that, without a bill of particulars from defendant, the plaintiff would be in complete ignorance of the sums of money, items, dates, &c., by which defendant will attempt to prove his payments to, and accountings with plaintiff's assignor. *Held*, that a case was presented which called for the discretionary power of the court within the rule laid down in *Witkowski v. Paramore* (93 N. Y. 467); *Dwight v. Germania Ins. Co.* (84 N. Y. 493); *Diossy v. Rust* (46 Super. Ct. 374); and the order requiring the defendant to furnish a bill of particulars was a proper exercise of the power conferred by § 531 of the Code of Civil Procedure.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided December 7, 1885.

Appeal from order requiring defendant to furnish a bill of particulars.

Shipman, Barlow, Larocque & Choate, and Sol. Hanford, for appellant.—The granting of the order appealed from was not a proper exercise of discretion. There is no authority for such an order in precedent or principle. A defendant is permitted to plead payment in connection with the general issue. The naked plea of payment is one which sufficiently informs the plaintiff. To require the extended amplification of this plea would be to unjustly require the defendant, notwithstanding his general denial, to lay before the plaintiff all the evidence upon which he may intend to rely to defeat the plaintiff's claim, and that,

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in a case where, as to all this evidence, the plaintiff must necessarily be informed equally with the defendant (*Watt v. Watt*, 2 *Robt.* 684). It is believed that no case can be found where it has been held that a defendant will be required to furnish a bill of particulars of his naked allegation of full payment. There are no particulars of such a defense.

Johnes, Benner & Willcox, and *Henry C. Willcox*, of counsel, for respondent.

BY THE COURT.—FREEDMAN, J.—The complaint alleges three causes of action, viz.: 1st. Work, labor and services of plaintiff's assignor of the value of \$1,800. 2d. Money had and received for the use of plaintiff's assignor, \$1,945.42. 3d. Money paid, laid out and expended by plaintiff's assignor at defendant's request, to the amount of \$590.92.

The answer consists of a general denial as to each of the causes of action, and the defense that the plaintiff's assignor has been fully paid for any services rendered or moneys paid, laid out or expended, and that the defendant has fully accounted for any moneys at any time received by him for account of the plaintiff's assignor.

Upon plaintiff's motion for a bill of particulars concerning the alleged payments to, and accounting had with plaintiff's assignor, it was made to appear by the affidavit of the plaintiff, that upon demand, he had furnished the defendant with a bill of particulars containing the items and details of the causes of action set out in the complaint; that in such bill he had given to the defendant credit for every payment known to him to exist; that he has no knowledge or information as to the defendant having ever paid anything further than what he had been given credit for; and that without a bill of particulars he will be in complete ignorance of the sums of money, items, dates, &c., by which the defendant will undertake to prove his alleged payments to, and accounting had with, plaintiff's assignor.

Statement of the Case.

These matters were not denied by any counter affidavit, and as it was apparent that the plaintiff could have no personal knowledge concerning the defendant's alleged payments to, or the accounting had with, plaintiff's assignor, a case was presented which called for the exercise of the discretionary power of the court within the rule as laid down in *Witkowski v. Paramore* (93 N. Y. 467); *Dwight v. Germania Ins. Co.* (84 *Ib.* 493); *Diossy v. Rust* (46 *Super. Ct.* 374).

Under the circumstances as they appeared, the order requiring the defendant to give to the plaintiff a bill of particulars concerning the alleged payments to, and the accounting had with, plaintiff's assignor, was a proper exercise of the power conferred by section 531 of the Code of Civil Procedure.

The order appealed from should be affirmed, with costs, &c.

SEDGWICK, Ch. J., concurred.

JOHN B. IRELAND, RESPONDENT, v. THE METROPOLITAN ELEVATED R. CO. APPELLANT.

Elevated railways—total damage recoverable—loss of rent and total damage cannot both be recovered.—Noise, smoke, ashes, dust, cinders, steam, gas, vibration, damages recoverable for injuries by—cases approved and disapproved.

Total damage to fee for permanent injury amounting to the taking of private property may be recovered in an action against an elevated railroad company, upon an offer at the trial to convey the property alleged to have been taken.

Total damage for taking easement attached to real estate, must be limited to the value of the easement taken, in ascertaining which the diminution in the value of the property to which such easement is attached, by the taking thereof is to be considered. This value the abutting owner may have determined at a particular time, and the jury may by their verdict either assess the value as of the time of the original taking and award interest thereon, or give a corresponding gross sum including both principal and

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interest. But such owner cannot *in addition* recover for loss of rents, either in the place of interest or otherwise.

Damages may be awarded as compensation for injuries to easement caused by the *noise, smoke, ashes, dust, steam, gas, or cinders*, or even the vibration of the building resulting from the operation of an elevated railroad (as well as for those caused by the structure itself and the obstruction of the passage and circulation of light and air occasioned by the running of the trains), upon its appearing that the manner of running, and the physical effects proceeding therefrom, constitute a use of the street in fact other than, or beyond an ordinary and legitimate use thereof, which is a question of fact to be determined in each case upon all the circumstances surrounding it.

The doctrine on this question of the cases in this court of *Taylor v. Metropolitan Elevated R. R.*, 50 *Super. Ct.* 311, and *Drucker v. Manhattan R. R. Co.*, 51 *Id.* 429, approved and followed. The decisions in the *Story* and *Peyser* cases in other courts disapproved.

Resumé of cases as to rights, duties, and remedies, decided on questions arising out of the construction and operation of elevated railroads.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided December 7, 1885.

Appeal by defendant from a judgment of \$14,402.95, entered against it upon the verdict of a jury, and from the order denying defendant's motion upon the minutes for a new trial.

The facts appear in the opinion.

Davies & Rapallo, attorneys, and *Julien T. Davies*, and *Edward S. Rapallo*, of counsel for appellant, on the questions considered in the opinion, argued:—I. No recovery should have been allowed for loss of rent. The plaintiff cannot recover, upon any theory, the total damage to the property and at the same time loss of rent. A permanent interference with an easement may form the foundation of an action for damages, and the rule of damage might, under some circumstances, be the injury occasioned to the land by the permanent interference with the right or easement appurtenant to the same (*Wilson v. Wilson*, 2 *Vt.* 68; *Bryan v. Whistler*, 8 *Barn. & Cress.* 288; *Applegate v. Morse*, 7 *Lans.* 59; *Mainwaring v. Giles*, 5 *Barn. & Ald.* 361; *Clark v. School Board*,

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L. R. 9 Ch. Ap. 120 ; *Cumberland & Ox. Co. v. Hitchings*, 65 *Maine*, 140). Hence the recovery by plaintiff of the total damage to his property, once for all, can only be upon the theory that his rights to light, air and access attached to his ownership of that property were by some presumably permanent structure interfered with or partially destroyed, and that the property taken from him or appropriated for the railroad was not land itself. But the same theory would preclude his recovery for loss of rents, which might, perhaps, be the proper damages recoverable in an action for a continuing trespass upon land. (*Nicklin v. Williams*, 10 *Exchq. Rep.* 259).

II. No recovery should have been had for damage, if any, produced by such noise as may be incidental to the running of the trains, and that, too, whether or not such noise occasioned any deterioration in the value of the property by abridgment of any supposed easement. Plaintiff has no property, right or easement, by reason of the street having been opened under the act of 1813, appurtenant to his land, as the dominant tenement, over the street, as the servient tenement, that the same shall be quiet, or that the air shall not vibrate, or that the air shall be pure and free from pollution. He did not own the fee in the street, the same having been opened under the act of 1813. Hence, at most, his only property in the street could be such easement as is created by the trust to keep the street open, specified in that act. That trust could only create the easements of light, air and access as they are recognized by the law (*Hill v. Nipper*, 2 *H. & C.* 121 ; *Keppe v. Bailey*, 2 *Myl. & K.* 535). The recognized easement of air, consists in a right to the circulation of air in and about the land and premises constituting the dominant tenement, irrespective of its purity or defilement. No such easement is known to the law as a right appurtenant to a dominant tenement of fresh or pure air, over a servient tenement. There is a distinction between an easement of air, and the natural right to have the air which would naturally flow from any direction over his

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land, pure and undefiled—a right which is his in common with the rest of mankind. For the taking of the first he may require compensation, but for an interference with the latter as an individual, can maintain no action against a defendant to recover damages for creating a nuisance in the absence of negligence, if the defendant has the authority of the state for the acts which it performs (*Goddard's Law Easements, Bennett's Ed.* p. 28; *Simpson v. Savage*, 1 *C. B. N. S.* 347; *Metropolitan Asscn. v. Petch*, 5 *C. B. N. S.* 504; *Kadgill v. Moor*, 9 *C. B.* 364; *Hewlins v. Shippam*, 5 *B. & C.* 229; *Rangeley v. Midland, &c.*, *L. R.* 3 *Ch. App.* 310; *Bliss v. Hall*, 4 *Bing. N. C.* 186). The court of common pleas has at length decided, in the case of *Peyser*, that damage by noise is not a proper element of recovery. And yet, upon principle, what distinction can be drawn between noise (*i. e.*, an unusual vibration of the air, but not an obstruction to circulation), and odors (*i. e.*, a pollution or defilement of the air)? Any unlawful noise or unlawful pollution would give a cause of action for damages by nuisance at most. There is no distinction whatever between noise and odors, &c., if unlawfully produced (*Crump v. Lambert*, *L. R.* 3 *Eq.* 413).

Anderson & Man, attorneys, and *E. Ellery Anderson*, of counsel for respondent, argued:—I. The only question raised by this appeal is as to the admissibility of the plaintiff's evidence of the loss sustained by him in rent, and in the selling value of his property. The general proposition that the abridgment by the erection and maintenance of the elevated railway structure, and by the operation of the road, of the plaintiff's easement in Amity street to light, air and access, rendered the defendant liable to the plaintiff to the extent of the loss directly resulting from such abridgment, has been determined by the court of appeals in the *Story* case (*Story v. N. Y. Elevated R. R. Co.*, 90 *N. Y.* 122; *Taylor v. Metropolitan Elevated R. R. Co.*, 50 *Super. Ct.* 311).

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II. The exceptions to the plaintiff's evidence relating to rent of the premises with and without the railroad are not well taken (*Taylor v. Metropolitan Elevated R. R. Co.*, *supra*).

III. The exceptions to the plaintiff's evidence of the selling value of the premises with and without the railroad are not well taken. It has been often held that when the property taken constitutes part of a larger parcel the damages are measured by the diminution in value of the remaining parcel (*Henderson v. N. Y. C. & H. R. R. Co.*, 78 *N. Y.* 423; *Matter N. Y. C. & H. R. R. Co.*, 6 *Hun*, 149; *Taylor v. Metropolitan Elevated R. R. Co.*, *supra*).

IV. There is no distinction between the liability of the defendants for constructing their structure, and their liability for operating their railway. In either case they are liable if they abridge or impair the plaintiff's easement in light, air and access (*People v. Kerr*, 27 *N. Y.* 188; *Story v. N. Y. E. R. R.*, 90 *Id.* 122; *Taylor v. Metropolitan Elevated R. R. Co.*, *supra*; *Drucker v. Manhattan Ry. Co.*, 51 *Super. Ct.* 429).

BY THE COURT.—FREEDMAN, J.—This action was brought to recover the total damage occasioned to the premises Nos. 67 and 83 West Third street (also known as Amity street), and No. 2 South Fifth avenue (being the northwesterly corner of South Fifth avenue and Amity street), by the abridgment of the easement of light, air and access appurtenant to said premises in consequence of the construction, maintenance and operation of defendant's railroad through West Third or Amity street, and in front of said premises.

The plaintiff proved title and possession of these three parcels of property in his father, John L. Ireland; the death of his father in 1879; the devise of the three parcels to himself by his father's will; and occupation by himself, through his tenants, since his father's death. He also proved an assignment from himself, as executor of

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his father's will, to E. Ellery Anderson, and an assignment from E. Ellery Anderson to himself, the plaintiff, of any claim which his father's estate might have for the said damages, or any part thereof. The buildings on the premises are three-story brick dwellings, and they were built before the railroad was commenced or authorized.

The construction of defendant's railway was commenced in April, 1876. It was completed in April, 1878, and has been operated since June, 1878. Amity street was opened under the act of 1813.

In such a case an abutting owner, as such, though he owns no part of the street, has an easement in the street to the extent of light and air, and free access to, and egress from, his premises, and any abridgment of such easement by the construction, maintenance or use of an elevated railway, in a manner inconsistent with the ordinary uses of a street, although pursuant to public consent, constitutes, if damage is occasioned thereby, a taking of private property within the meaning of the constitution, and entitles the owner to compensation (*Story v. N. Y. Elevated R. R. Co.*, 90 *N. Y.* 122 ; *Taylor v. Metropolitan Elevated Ry. Co.*, 50 *Super. Ct.* 311).

Such compensation may be ascertained and determined on application of the company, in proceedings instituted for the condemnation of so much of the abutting owner's interest as has been taken, or is to be taken. The proceedings finally result in a transfer of the title of the property condemned upon payment or deposit of the sum awarded therefor, and such transfer of title, when completed, is conclusive upon subsequent grantees of the abutting owner, and all persons subsequently deriving any title or interest from or through him. If the company neglects to commence such proceedings, the abutting owners may elect how to proceed. He may invoke the powers of a court of equity, and have the construction or the operation of the railway enjoined, from and after such lapse of time as under all the circumstances is found to be a reasonable one for the company to make compensation,

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and the compensation may be determined by the judgment, as in *Henderson v. N. Y. C. & H. R. R. Co.* (78 N. Y. 423), or left by the judgment to be determined subsequently, either by agreement, or by proceedings of condemnation, as in *Story v. N. Y. Elevated R. R. Co.* (90 N. Y. 122), and *Glover v. Manhattan R. Co.* (51 *Super. Ct.* 1).

It may also be deemed to have been well settled that, so long as no compensation has been had for the permanent injury, an abutting owner may bring successive actions at law for the loss, from time to time, of rent caused by the abridgment of the easement, as in the case of a continuing nuisance. In these cases there is no transfer of title, and the payment of one judgment is no bar to a subsequent action for a different period. From this, it follows that successive owners of the same premises, or even tenants under certain circumstances, may maintain actions for the injury to their respective interests.

The right of an abutting owner to maintain an action at law to recover the total damage to his fee upon the theory that the injury is a permanent one, is not so firmly established, although such recoveries have taken place. The difficulty in such a case arises from the following considerations, viz.: In the case of personal property wrongfully taken, the true owner may elect not to pursue his property, but to hold the wrongdoer for the full value thereof. In such a case, the title becomes vested in the wrongdoer upon payment. But land cannot be taken like personal property. There may be wrongful use and occupation, trespass and continued trespass, but there can be no conversion in the sense in which personal property may be converted. The moment the wrongful use or occupation, or the trespass ceases, the owner has his land as before. No title to land can be acquired by wrongful use and occupation or trespass. A deed is necessary to pass the title. The consequence is, that in an action at law against an elevated railway company, to recover

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the total damage to the market value of the fee, the company may insist that upon payment of such damage it is entitled to a proper conveyance so as to be protected against the claims of subsequent owners of the premises. But the difficulty may be overcome by the offer of the plaintiff to make such a conveyance. If, therefore, the complaint charges a taking of a permanent character, of property within the constitutional provision, and the answer, substantially admitting the taking and the permanent character thereof, creates an issue as to the liability of the company to make compensation, an offer by the plaintiff at the trial to deliver a proper conveyance is sufficient, and the action may then be treated as one on the case. In the case at bar all this has substantially been done, and consequently the right of the plaintiff to maintain the action as one for the total damage to the three parcels of property must be sustained, if otherwise made out.

The verdict rendered by the jury in favor of the plaintiff, presents, however, important questions as to the measure of damages. The verdict assesses the total damage to each of the three properties, and in addition, under the charge of the court authorizing the jury to do so, which was duly excepted to, allows compensation for loss of rents, viz.:

Rentals of No. 2 South Fifth Ave.	.	.	.	\$3,600
“ “ “ 67 West Third street	.	.	.	2,700
“ “ “ 88 “ “ “	.	.	.	2,250
Damages on property No. 2 South Fifth Ave.	.	.	.	
“ “ “ “ 67 West Third St.	.	.	.	2,500
“ “ “ “ 88 “ “ “	.	.	.	2,500

Total verdict, \$13,550

I do not see how this can be sustained, even if it be assumed that the plaintiff showed such a union of rights in his person as to entitle himself to a recovery of the total damage.

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In the case of the actual taking of land for the use of a railroad company, the measure of damages is a fair and full compensation for what was taken. In such a case the owner was always held entitled to the value of the land taken, estimated in view of the purposes for which it was intended to be used, and, where the land taken constituted part of a larger parcel, he was also held entitled to damages for the consequential diminution in the value of the residue of his property, restricted within certain limits (*Henderson v. N. Y. C. & H. R. R. R. Co.*, 78 N. Y. 423; *Matter of N. Y. C. & H. R. R. R. Co.*, 6 Hun, 149).

In the case of the abridgment by an elevated railway company of the easement which an abutting owner has in a street opened under the Act of 1813, which abridgment injuriously affects the property to which the easement is attached, the abridgment constitutes a taking of private property only to the extent that the erection and maintenance of the structure and the operation of the road are inconsistent with, and consequently in excess of, the ordinary uses for which the street was set apart, and the company is liable only to the extent of such taking (*Taylor v. Metropolitan Elevated R. Co.*, 50 *Super. Ct.* 311).

In determining, once for all time, the value of what was thus taken, it must be borne in mind that no increased liability exists on the part of the company in consequence of its failure to institute proceedings of condemnation. This has also been in effect determined by this court in the case of Taylor already referred to. The question, therefore, in every such case is, what is the total value of that which was taken? Such value the abutting owner has a right to have determined as of a particular time, as for instance the time of the taking. From such time the owner, as a general rule, is also entitled to interest on the value so determined. So long, therefore, as the jury in a given case received proper instructions upon this point, and the question was duly considered in the assessment

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of the amount, it can make no difference whether their verdict in form assesses the value as of the time of the original taking, and then awards interest thereon, or whether it is for a corresponding gross sum, including both principal and interest. But, beyond all that, the complaining owner cannot recover for specific items of damage alleged to have been sustained during certain limited periods of time, because all such items must be deemed to be covered by the award of total damage for all time. So I have been unable to find in our jurisprudence any principle upon which such owner can recover his total damage, and, in addition, loss of rents in the place of interest. The theory of the action, as I have repeatedly shown, always is, and always must be, to recover compensation for property taken. If such property were personal property, the measure of damages would undoubtedly be the value of the property taken at the time of the taking, with interest from such time. This was discussed in the case of *Taylor v. The Metropolitan Elevated Railway Co.*, *supra*, and a bare reference to what was there said, is all that is necessary here. Why a different rule should be applied to the taking of an easement, and a fluctuating measure preferred to a constant one, I cannot conceive. The mere fact that the easement has been taken in part only, and that a common law action to recover the permanent depreciation of the fee value of certain premises caused by such partial taking of the easement appurtenant thereto, is to a large extent a novelty, does not warrant such a wide departure from settled principles as would be involved in the promulgation of the rule that in such an action a recovery may be had for loss of rents in lieu of interest, and in connection with a recovery of the permanent damage. True, a recovery for loss of rent pure and simple in one action, is no bar to a subsequent action for a permanent taking. But in such a case, which can only arise in consequence of the continued neglect of the railway company to institute proceedings for condemnation, the company would still

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have the right to insist that the recovery in the first action for loss of rent should, in the subsequent action, take the place of interest for the period of time for which the recovery was had, or should otherwise be duly considered in the assessment of the total permanent damage.

In the case at bar the verdict, upon its face, presents inconsistencies. The jury found that the fee value of premises No. 2 South Fifth Avenue was not depreciated at all, and yet \$3,600 were awarded for loss of rents. As to premises No. 67 West Third street, the loss of rents was fixed at \$2,700, and the damage to the fee value at only \$2,500. As to premises No. 88 West Third street, the disproportion is not quite so great, but still large enough to show that the proper measure of damages was not observed.

The charge and the verdict in this case were, therefore, erroneous in the particulars mentioned, and cannot be sustained; and as the case is one in which the court at general term cannot make the proper computation, because it does not appear how the jury arrived at their conclusions, there must be a new trial.

There are some other exceptions which it is well to consider in this connection, because the questions covered by them will again present themselves upon the new trial. They relate to the refusals of the learned judge who presided at the trial, to charge unqualifiedly several requests made by defendant's counsel, the object of which was to have the jury instructed to the effect that, in estimating the damages, they could consider neither the noise made by the running of the trains, nor the gas and cinders emitted by the engines, nor the diminution of light and air, or any other effects produced by the running of the trains. In other words, the damages, if any, were sought to be restricted to such as had been caused solely and exclusively by the erection and maintenance of the structure of the road. The use of the road, it was claimed, did not entitle the plaintiff to any damages whatever, because the operation of the road upon the surface

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of the street would not have entitled him to any, if the road had been built as a surface road pursuant to public consent.

It is true that the general term of the supreme court, in the case of *Story*, recently held, in substance, that, besides the depreciation in value directly caused by the structure of an elevated road, and the depreciation in value directly caused by the mere obstruction of the passage, and circulation of light and air occasioned by the running of the trains, an abutting owner is not entitled to claim compensation for injury to his property caused by noise, smoke, ashes, dust, steam, gas or cinders, or even the vibration of the building, though they may all be occasioned by the operation of the road, because he could not claim such compensation from a surface road. And it is also true that, in the case of *Peyser*, the general term of the court of common pleas held, that noise caused by the passage of the trains on an elevated road, cannot be considered as an element of damage. But this court has already, after full consideration, laid down the rule to be that there may be an abridgment of the abutting owner's easement by the running of locomotives and trains, and that a recovery for such abridgment may be had, provided it appears that the manner of the running, and the physical effects proceeding therefrom, constitute a use of the street in fact other than, or beyond, an ordinary and legitimate use of the street, and that this is a question of fact to be determined in each case upon all the circumstances surrounding it (*Taylor v. Metropolitan Elevated Ry. Co.*, 50 *Super. Ct.* 311; *Drucker v. Manhattan Ry. Co.*, 51 *Ib.* 429).

It has also been held that even a surface railroad, lawfully in existence and operation, may in fact be operated to an extent going so much beyond the ordinary and legitimate uses of the street, as to involve an abridgment of the abutting owner's easement in the street, and to entitle him to a corresponding compensation (*Green v. N. Y. C. & H. R. R. Co.*, 65 *How. Pr.* 154).

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After a full and careful examination of these points of difference existing between this court and the other courts named, we feel constrained to say, that although we entertain the highest respect for the opinions delivered by the learned judges who differ with us to some extent, we have been unable to discover any reason why we should not adhere to our former rulings, for it must be constantly borne in mind that the principle underlying *all* the decisions in the surface road cases is merely that the construction and operation of a surface road pursuant to public consent, whether it be a horse or a steam railroad, in a public street of a city, is not, *per se*, a use of such a street inconsistent with the ordinary and legitimate uses of the street.

We are, therefore, bound to hold, that, inasmuch as there was in this case testimony given which was properly received, and which justified the submission to the jury of the question whether the running of the locomotives and trains, as they were run, involved a use of the street other than the ordinary and legitimate use, the refusals of the learned trial judge to charge unqualifiedly as requested, did not constitute error. Whether the qualifications which were made, in all respects conformed to the rule as laid down in the cases of Taylor and Drucker, it is not necessary to determine at present, especially as no corrections were asked for at the time.

There are other questions in the case which we pass in silence, as their determination is not necessary at present.

For the error resulting in the allowance of loss of rents in addition to the total diminution of the fee value, the judgment and order appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

SEDGWICK, Ch. J., and TRUAX, J., concurred.

Statement of the Case.

RICHARD LAVERY, ET AL., RESPONDENTS, v. PAT-
RICK M. HANNIGAN, ET AL., APPELLANTS.

*New York city.—Streets and highways, powers and duties of city regard-
ing.—Nuisance—injunction by private party against.—Special damage—
what sufficient proof of.*

The paramount duty of the city authorities, except as they are otherwise expressly directed, or in cases of necessity otherwise empowered, is to keep the streets of the city, inclusive of the sidewalks, open and unobstructed for the benefit of the people of the entire state; and as a general rule, the public are entitled not only to a free passage along the streets, but to a free passage along each and every portion of every street.

Under the "Consolidation Act" of 1888, the power of the common council of New York city to regulate the use of sidewalks, is subject to the limitation that the ordinance must not be inconsistent with law, and with the constitution of this state, and also to the further limitation that such common council shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof, during the erection or repair of a building on a lot opposite the same.

An injunction will go against a person who creates, maintains and continues a nuisance, in favor of one who is injuriously and specially affected thereby.

On a review of the evidence in this case, *Held*, that it appeared therefrom that defendant's use of the sidewalk in front of his store, for display of goods, in connection with an awning structure, and the acts of his employees in such use thereof, deprived the adjoining building (occupied by plaintiffs in their business), of light, air and access, to such an extent as showed sufficient special damage to sustain an injunction.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal by defendants from a judgment enjoining and restraining them from using the sidewalk in front of their store for certain purposes.

The injunction referred to in the opinion was as follows: "It is adjudged and decreed, that the above-named defendants, Patrick M. Hannigan and Michael L. Bouillon, their agents and employees, be and they hereby are enjoined and restrained from placing any goods, wares or

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merchandise or other materials and articles upon the sidewalk in front of the stores and premises known as Nos. 243 and 245 Grand street, in the city of New York, and said defendants, their agents and employees, are hereby further enjoined and restrained from hanging or suspending any goods, wares, articles or materials in front of said premises or over said sidewalk, and from doing, causing, or permitting to be done, any act or thing to incumber or obstruct said sidewalk, or the area and space above the same."

The facts appear in the opinion.

Cardozo & Newcombe, and *Charles Blandy*, for appellants.

Kelly & Macrae, and *Wm. F. Macrae*, for respondents.

BY THE COURT.—FREEDMAN, J.—The plaintiffs are retail dealers in white and ladies' goods at No. 243 Grand street in the city of New York, and have been doing business there for over thirty years. They lease the whole building, and occupy the first and basement floors for the purposes of their business. The other portions of the building are in the occupation of their tenants.

The defendants occupy the building No. 245 Grand street, adjoining the building of the plaintiffs on the easterly side thereof, and there carry on a general dry goods business.

Both buildings stand upon the southerly side of Grand street, and their fronts are in the same line. A flagged sidewalk which extends along the fronts of both buildings, is about eighteen feet in width, and constitutes a part of Grand street, which is a public street.

For some time prior to the commencement of this action, the defendants used a large part of the sidewalk in front of their store as a sort of annex to their place of business, and for the purpose of displaying quite a variety of goods. Some of these goods were placed upon the sidewalk, and others were suspended from a permanent

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awning structure. This structure extended the full width of the store from the front of the store to the curb-stone or outer edge of the sidewalk, where it rested on iron columns, and on the sides it had canvas wings, to be used on rainy days, and which, when used, reached from the top of the awning to the surface of the sidewalk. Each of these wings, when used, extended about seven and a half feet out from the front of the store. When not in actual use, the wings were reefed or drawn together against the building. The awning also had pivoted slats, which opened and closed in the same manner as Venetian blinds or shutters do. In short, the arrangements were such as to enable the defendants, on wet days, to inclose the sidewalk in front of their store for a space of twenty-five feet (the width of the store) by seven and a half feet, and to use it as a part of their store, and they did so use it.

Upon the whole, the continuous regular use made by the defendants of the sidewalk in front of their store, deprived the building of the plaintiffs of light and air to a considerable extent at all times, and entirely cut off the view of their store from the east side. The plaintiffs were also annoyed by the defendants in this, that the goods so displayed were frequently projected and suspended over a part of the front of plaintiffs' premises, and especially over a part of the space in front of the hall and doorway leading to the first loft of plaintiffs' premises; that, in the adjustment and arrangement of the display of the goods, a number of men in the employ of the defendants were engaged for a considerable time every morning, who placed and used boxes, ladders and poles directly in front of the said hall and doorway of the plaintiffs; and that by these means the access to plaintiffs' premises was interfered with.

Upon these facts, there can be no doubt that, as found by the learned judge below, the plaintiffs showed sufficient special damage.

The main contention of the defendants is, however,

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that, notwithstanding such damage, the plaintiffs have no cause of action, because the acts done by them, the defendants, were done under a permit granted to them by due public authority.

The permit in question appears to have been granted by the registrar of permits, and it purports to have been issued by virtue of a corporation ordinance, and to give permission to exhibit goods. It also provides, in express terms, that the privilege thereby granted must be exercised inside of the stoop line in front of the premises, and must not be of such size and character as to be or become an obstruction to the rights of the neighbors, and that goods, when exhibited, must not be placed more than three feet from the building line, and not to a greater height than five feet.

The permit, upon its face, therefore, authorized no such use of the sidewalk by the defendants as the proof showed they had made of it, for they went far beyond the stoop line.

Besides that, the ordinances of the city of New York limit the hanging or placing of any goods to twelve inches from the front of the store or building (*Corporation Ordinances*, in force Jan. 1, 1881, § 52), and no provision has been pointed out which confers upon the registrar of permits, who by section 281 of the said ordinances, is authorized to grant permits in certain cases, any greater power.

Not even the mayor, aldermen and commonalty of the city of New York, collectively, can authorize such a use of a sidewalk as the defendants made of the sidewalk in front of their premises. True, under subd. 3 of section 86 of the Consolidation Act of 1882, the common council has power to regulate, by ordinance, the use of sidewalks, and to prevent in like manner the extension of building fronts and house fronts within stoop lines. But this power is expressly made subject to the provision contained in the beginning of the section, that the ordinance must not be inconsistent with law and the constitution of

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this state, and is also subject to the further provision contained in subd. 4 of the same section, that they shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof, during the erection or repair of a building on a lot opposite the same.

The paramount duty of the city authorities, except as they are expressly otherwise directed, or in cases of necessity otherwise empowered, is to keep the streets of the city, inclusive of the sidewalks, open and unobstructed for the benefit of the people of the entire state. As a general rule, the public are entitled not only to a free passage along the streets, but to a free passage over each and every portion of every street. These propositions have been laid down and reiterated so often that it would be a waste of time to collect all the authorities that could be cited in their support. The cases of *People ex rel. O'Reilly v. Mayor, &c.* (59 *How. Pr.* 277), and *Ely v. Campbell* (59 *Ib.* 333), are quite sufficient for the purpose.

The examination so far made sufficiently shows that the acts of the defendants in displaying their goods in the manner they did, were wholly unauthorized. The necessary tendency of these acts was to impair the usefulness of the sidewalk as a public thoroughfare, as well as to cause damage to the plaintiffs. Public and private rights were alike violated. The defendants were therefore guilty of having created, maintained and continued a nuisance which injuriously and specially affected the plaintiffs, and upon the authorities, the plaintiffs were entitled to an injunction, especially as the defendants refused to discontinue their practices unless restrained by the court (*Trenor v. Jackson*, 15 *Abb. N. S.* 115; *Hallock v. Schreyer*, 33 *Hun*, 111).

The findings of fact signed by the learned judge below are not accurate as to the height of the awning, and they may be inaccurate as to a few other particulars, but these inaccuracies do not affect the merits. In all essential

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things the findings as made are sustained by the evidence, and in turn they support the conclusions of law based thereon.

The injunction, as granted by the judgment, does not enjoin and restrain the defendants from carrying goods across the sidewalk out of or into their store, nor from temporarily placing them thereon during the process of loading or unloading carts or wagons, nor does it deprive the defendants of any right to use the sidewalk in the same manner in which it may be used by any other person. When reasonably and properly construed, it only enjoins and restrains practices resulting, or having a tendency to result, in what are commonly denominated street obstructions.

The judgment should be affirmed, with costs.

SEDGWICK, Ch. J., and VAN VORST, J., concurred.

THOMAS MACKELLAR, RESPONDENT, v. GEORGE W.
ROGERS, IMPEADED, &C., APPELLANT.

Jury trial of cause of action at law in counter-claim to an equitable action triable by the court—right of—requisites to obtain.

Where a counter-claim, founded on a cause of action at law, is interposed to a complaint in an action for equitable relief, triable by the court without a jury, if a jury trial of the issues arising on such counter-claim is desired by either party, he must, within ten days after issue joined on the counter-claim, give notice under Rule 31, of a special motion to be made on the pleadings, that the whole issue, or any specific questions of fact involved therein, be tried by a jury. If he omits to do this, he waives a jury trial, and cannot, on the trial at special term before the court, claim a jury trial of the issues on the counter-claim, as matter of right.

In such case, it is discretionary with the court to grant a postponement of the trial for the sole purpose of enabling said party to make such special motion.

Sections 970 and 974 Code, construed.

Appellant's points.

Before VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from a judgment of the special term decreeing foreclosure and sale of mortgaged premises.

The facts and exceptions appear in the opinion.

Martin J. Keogh, attorney, and of counsel for appellant, argued :—I. The counter-claim sets forth a cause of action at law, for damages for a breach of contract, and demands judgment for a sum of money only. It contains matter for which a separate cause of action might be maintained by defendant against plaintiff and upon which defendant is entitled to a jury trial as matter of right (*Code*, §§ 968, 974; *Cook v. Jenkins*, 79 *N. Y.* 575; *Kain v. Delano*, 11 *Abb. N. S.* 29; *Hewlett v. Wood*, 62 *N. Y.* 75; *Clark v. Brooks*, 26 *How.* 285; *McDonnell v. Stevens*, 9 *Hun.* 28; *Ross v. Combes*, 37 *Super. Ct.* 289; *Litchfield v. Dezendorf*, 11 *Hun.* 358; *Brady v. Cochran*, 23 *Ib.* 274). For the purposes of this argument, the court must look at defendant's counter-claim, as if it was in the form of a complaint in an action brought upon it by defendant against plaintiff (*Code*, § 974; *Cook v. Jenkins*, 79 *N. Y.* 575). Here defendant has interposed a counter-claim, and has demanded an affirmative judgment thereupon. An issue of fact arises upon this counter-claim made by plaintiff's reply. Defendant is therefore clearly within *Code*, § 974. "In each of the following actions an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is directed : (1.) An action in which the complaint demands judgment for a sum of money only" (*Code*, § 968). Here the judgment demanded is for a sum of money only. Even if an account were involved, it would not deprive defendant of his constitutional right to a jury trial (*Bell v. Mayor*, 11 *Hun.* 511; *Camp v. Ingersoll*, 86 *N. Y.* 433; *Van Rensselaer v. Jewett*, 6 *Hill*, 373; *Thomas v. Reab*, 6 *Wend.* 503; *Magown v. Sinclair*, 5 *Daly*, 63; *Keep v. Keep*, 58 *How.* 139; *Townsend v. Hendricks*, 40

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How. Pr. 143). The only recovery defendant can have is for damages (*Jerome v. Scudder*, 2 *Rob.* 169; *Smith v. Kelly*, 56 *Me.* 64; *Love v. Cobb*, 63 *N. C.* 324; *Youell v. Allen*, 18 *Mich.* 108; *Vigers v. Pike*, 8 *Clk. & Fin.* 582; *Nelson v. Bridges*, 2 *Beav.* 239; *Story on Equity*, § 769; *Sternberger v. McGovern*, 56 *N. Y.* 12; *McDonnell v. Stevens*, 9 *Hun*, 28; *Wiswall v. McGown*, 2 *Barb.* 270; *Shepard v. Sanford*, 3 *Barb. Ch.* 127; *Newham v. May*, 13 *Price*, 749; *Blore v. Sutton*, 3 *Meriv.* 247; *Clifford v. Brooks*, 13 *Vesey*, 130; *Story on Equity*, §§ 794, 749; *Bradley v. Aldrich*, 40 *N. Y.* 504; *Ross v. Combes*, 37 *Super. Ct.* 289).

II. The cause of action in this case in favor of defendant, is clearly distinguishable from *Cook v. Jenkins*, (79 *N. Y.* 515), and *Whiton v. Spring* (74 *Ib.* 169). Those were equity actions. This is clearly a common law action, and defendant's right to have it tried by a jury is absolute (*Kain v. Delano*, 1 *Abb. N. S.* 29; *Hewlett v. Wood*, 62 *N. Y.* 75; *Constitution of N. Y.*, art. 1, § 2).

III. Since it is clear that defendant is entitled to a jury trial upon the cause of action arising upon his counterclaim, the remaining inquiry is, as to whether he has waived his right. We submit that the defendant has not waived it, and that his legal rights have been preserved (*Code*, § 1009; *Wheelock v. Lee*, 74 *N. Y.* 495; *Davidson v. Asso. of Jersey Co.*, 71 *N. Y.* 333; *aff'g* 6 *Hun*, 470; *Hennequin v. Butterfield*, 43 *Super. Ct.* 411; *Hudson v. Caryl*, 44 *N. Y.* 553; *Litchfield v. Dezendorf*, 11 *Hun*, 358). These authorities clearly dispose of the question of waiver. In *Hand v. Kennedy* (83 *N. Y.* 149), and *Derham v. Lee* (87 *N. Y.* 599), defendants lost their right to a jury trial solely because they failed to demand it, in the latter case, and failed to secure a ruling upon this demand for a jury in the former.

IV. The court erred in holding that the practice required the defendant to move at special term to frame issues, to be tried by a jury. It is only in a case where a party is not entitled to a jury trial as matter of right, that an order

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may be made framing issues for a jury (*Code*, § 823; *Snell v. Loucks*, 12 *Barb.* 385; *Const.* art. I. § 2). (1) The fact that the jurisdiction of courts of law and courts of equity are blended, and that the Code has abolished the distinction between remedies at law and in equity, does not deprive a party of a right to trial by jury, in a case where, prior to the adoption of the Code, he had such right, and any statute or provision of the Code, which would direct a court to frame issues in a common law action, would be unconstitutional (*Const.* art. I. § 2). (2) The language of the constitution on this point is clear and explicit, so as to preserve the ancient right to a jury in all cases in which it existed prior to the adoption of the constitution. The language is as follows: "§ 2. The trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever." (3) This constitution was adopted in 1846. The only inquiry, then, is whether a party in an action to recover damages for breach of contract, which is a simple action at law, was entitled to a jury trial in such an action prior to 1846. There can be no question on this point. No one will contend that an action for damages for breach of contract was within the jurisdiction or cognizance of a court of chancery prior to 1846. (4) Before the constitution of 1846, issues could be framed only in chancery suits, in a proceeding which, under the old practice, was denominated a "feigned issue" (3 *Blackstone's Com.* 452; *Baylies' Trial Prac.* 272; *Snell v. Loucks*, 12 *Barb.* 385; *Laws* 1838, p. 244; *Griffith v. Griffith*, 9 *Paige*, 315; *Laws* 1839, p. 292; *Chancery Rule*, 96; *Lord Teynham v. Tyler*, 6 *Bing.* 561; *Barker v. Ray*, 2 *Russ.* 63; *Carroll v. Deimel*, 95 *N. Y.* 252). (5) The term "feigned issue" is thus defined by elementary writers: "An issue brought by consent of the parties or by the direction of a court of equity, or of such courts as possess equitable powers, to determine before a jury some disputed matter of fact which the court had not the power or is unwilling to decide" (*Bowvier's Law Dict.*). (6) The Code (§ 823) has

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abolished "feigned issues" and substituted instead the practice of framing issues. The result is that in equity suits, instead of resorting to the old practice of a feigned issue, the court makes an order to frame issues to be tried by a jury. (7) This practice, however, has nothing to do with common law actions. The court cannot frame issues in such actions under section 970 or 971, any more than a court of law could resort to a "feigned issue" in an action for trover or conversion. And if any of these sections did compel the framing issues in common law actions, they would be unconstitutional in that respect. But the language used in the sections carefully provides against such a result. (8) In 823, the language as to framing issues is, that such issues may be framed "in any case, where neither party can, as of right, require a trial by jury." (9) It follows then, that if either party can, as of right, demand a jury trial, issues cannot be framed. Now, what would be "the mode of trial on this counter-claim," if it arose in an action brought by defendant against plaintiff?" (*Code*, § 974). (10) So the language of section 971 is equally guarded: "In an action where a party is not entitled, as of right, to a trial by jury." (11) The language of section 970 is "where a party is entitled by the constitution or by express provision of law, to a trial by a jury, of one or more issues of fact, in an action not specified in section 968 of this act." (12) It follows, that if defendant's counter-claim "arose in an action brought by defendant against the plaintiff" it would fall within such actions as are specified in section 968; because the defendant asks no equitable relief, but "demands judgment for a sum of money only." It is clear, therefore, that section 970 has no application to this case, and that defendant is entitled to a trial by jury as a matter of right. (13) In *Carroll v. Deimel* (95 N. Y. 252), the action was to foreclose a mortgage. The defense was simply payment. The court held that the action was an equity action, and that findings of a jury, if afterwards disregarded by the chancellor, may be reviewed on appeal, but in that case there was no

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counter-claim upon which defendant would have been entitled to bring a separate action against plaintiff. (14) Here, such a counter-claim is pleaded, and the question before the court is, "If the counter-claim had arisen in an action brought by defendant against the plaintiff, for the cause of action stated in the counter-claim," would he, in such an action, be entitled, as of right, to a trial by jury. Because "the mode of trial" cannot be changed, for the reason that the cause of action happens to be embraced in the counter-claim, instead of in the original complaint (*Code*, § 974). (15) The court, therefore, must consider the question just as if no equity suit for the foreclosure of the mortgage were pending. Such suit has no bearing on the particular inquiry presented on this appeal.

George M. MacKellar, attorney, and of counsel for respondent, argued :—I. The defendant has no constitutional right of trial by jury of the questions raised by his counter-claim (*Constitution* 1846, art. 1, § 2; *Chapman v. Robertson*, 6 *Paige*, 627; *Jennings v. Webster*, 8 *Ib.* 503). Under the Code of Procedure, actions to foreclose mortgages were tried by the court at special term, without a jury (*Code Proc.* §§ 253, 254; *Goold v. Bennett*, 59 *N. Y.* 124). The fact that an answer was interposed, demanding an affirmative judgment, did not alter the character of the action or the mode of trial (*Welsh v. Darragh*, 52 *N. Y.* 590; *Townsend v. Hendricks*, 40 *How. Pr.* 143; *Verplanck v. Kendall*, 45 *Super. Ct.* 525; *Matter of Empire City Bank*, 18 *N. Y.* 199). Under the Code of Civil Procedure such actions are to be tried by the court without a jury (section 969), unless the defendant proceeds to obtain a jury trial under the provisions of sections 974 and 970.

II. The only right the defendant has to a jury trial of the counter-claim set up in the answer, is by virtue of the provisions of section 974 of the Code of Civil Procedure. Section 974 is not mandatory upon the defendant. Nor under that section can the court or the plaintiff compel a

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defendant to submit to a jury trial. It is optional with the defendant whether he will have such a trial or not. But if he wishes to avail himself of the provisions of section 974, and desires his counter-claim to be tried by a jury, he must proceed to obtain a jury trial in the manner directed by and in accordance with the provisions of section 970. Section 968 specifies the actions which must be tried by a jury unless a jury trial is waived, or a reference is directed. This is not one of the actions specified in section 968. That section covers cases where the complaint demands judgment for a sum of money only, and actions for ejectment, &c., specified in subdivision 2. The complaint in this action does not demand judgment for a sum of money only.

III. Whatever right the defendant had to a jury trial he waived by failing to comply with the requirements of section 970 of the Code, and general rule 31. The defendant's failure to move for the framing of issues within ten days after issue joined, and his giving a notice of trial for the special term, constituted a waiver of his right to a jury trial under section 974. By failing to claim it at the proper time or in the proper manner, or by any conduct which would be sufficient to constitute a waiver of rights in other cases, the party is deemed to have waived his right to trial by jury, whether that right be constitutional or legal (*Baird v. Mayor*, 74 *N. Y.* 382; *Barlow v. Scott*, 24 *Ib.* 40; *Greason v. Keteltas*, 18 *Ib.* 491; *West Point Co. v. Reymert*, 45 *Ib.* 703; *McKeon v. See*, 51 *Ib.* 300).

IV. The postponement or adjournment of the trial being discretionary with the trial judge, the exception to the refusal to postpone was not well taken.

BY THE COURT.—FREEDMAN, J.—The only question presented by the exceptions is whether the trial of the action should or should not have been postponed until after a trial by jury was had, of the issue arising upon defendant's counter-claim.

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The action was brought for the foreclosure of a mortgage for \$15,000, and interest. By his answer the defendant admitted all the facts set forth in the complaint, and then set up a counter-claim against the plaintiff for about \$51,000, for a breach of contract, upon which he demanded an affirmative judgment. The plaintiff replied to the counter-claim. Both parties noticed the case for trial at special term, but when it was called for trial in its order upon the calendar, the defendant, before any evidence was given, demanded a trial by jury of the cause of action embraced in his counter-claim as his constitutional and legal right. The motion was denied upon the ground that the proper mode of applying for a jury trial under such circumstances was by special motion to have issues framed and sent to a jury. To this ruling and denial of his motion, the defendant duly excepted.

The defendant then asked leave to make application at special term for the framing of issues. This motion was also denied, and the defendant duly excepted. The defendant thereupon withdrew from the case.

There can be no doubt that the claim of the defendant, as stated by the counter-claim, is one upon which, in a separate action directly brought upon it, he would be entitled to a jury trial as matter of right. But from this it by no means follows that he can rightfully claim the same mode of trial in the present action.

The constitutional right to a jury trial extends only to cases in which it existed prior to the adoption of the constitution. In the case at bar there is no such right, because the action is an equitable one which at all times was, and now is, triable by the court alone, formerly by the court of chancery, now by the court at special term, and because in the court of chancery of this state the right of set-off in such an action existed solely by virtue of the provisions of the Revised Statutes (*Chapman v. Robertson*, 6 *Paige*, 627; *Jennings v. Webster*, 8 *Ib.* 504), which conferred no right of trial by jury, although the

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court had discretionary power to frame a feigned issue and order that to be tried by a jury.

Since that time the practice in this respect has been considerably changed. The jurisdiction of courts of law and of courts of equity has been blended ; feigned issues have been abolished, and the practice of framing issues has been substituted, and the right to interpose counter-claims has been enlarged. It consequently remains to be seen whether there is any statutory ground for the contention of the defendant.

Section 974 of the Code of Civil Procedure provides that where the defendant interposes a counter-claim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon, is the same as if it arose in an action, brought by the defendant against the plaintiff, for the cause of action stated in the counter-claim, and demanding the same judgment.

This section, therefore, upon an issue arising upon a counter-claim like the one in suit, confers a right of trial by jury, because the defendant would be entitled to such a trial, if he were to bring an independent action upon the same claim.

But the right is a purely statutory one. The section is not mandatory upon the defendant. It gives him an option whether he will have such a trial or not. If he wishes to obtain the benefit of the statute in an action triable by the court alone, he must proceed to exercise his option and take certain steps. His remedy is under section 970, which provides that, where a party is entitled, by the constitution or by express provision of law, to a trial by a jury of one or more issues of fact, in an action not specified in section 968, he may apply upon notice to the court for an order, directing all the questions, arising upon those issues, to be distinctly and plainly stated for trial accordingly, and that thereupon the court must cause such issues to be distinctly and plainly stated. Section 968 does not help a defendant in such a case to

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escape from the necessity of making his motion or application, because, besides the actions of ejectment, for dower, for waste, for a nuisance, and to recover a chattel, it covers only cases in which *the complaint* demands judgment for a sum of money.

The fact is that the different provisions of the Code of Civil Procedure, bearing upon the point under consideration, can be harmonized in no other way than by holding that the only remedy of a defendant in such a case is under section 970. This alone would be sufficient to call for the construction of section 974 hereinbefore contended for. But there are additional considerations of great weight. The character of an action, and the mode of trial of the issues of fact tendered by the complaint therein, are in every case determined by the complaint. The intent of section 974 is to enable a defendant to have his counter-claim considered in the disposition of plaintiff's case, whether such case be of a legal or equitable nature. In other words, the defendant may, in all cases, have his counter-claim determined in connection with the claim made by the plaintiff as one of the issues in the case. But this involves that the defendant must proceed in such a way that the court can do it without unnecessarily delaying the plaintiff's case upon the main issue. If the cause of action brought by a plaintiff into court is one which must be determined by the court without a jury, the counter-claim of the defendant, though it may be triable by jury at the option of the defendant, must be presented at the trial of the main issue in such a shape that due effect can be given to it at the close of plaintiff's evidence. For these reasons it would be unjust to construe section 974 to mean that the defendant in such a case, after the joinder of issue upon the counter-claim, may sit still for months, until the case is reached for trial in its order upon the special term calendar, then try plaintiff's side of the case, which is the main issue, and after all that, when defeated upon that, claim a jury trial upon his separate issue, and thus prevent a final judgment for many more

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months, if not years. But this is what the defendant's contention upon the present appeal amounts to, especially in view of the fact that his answer contains an express admission of all the material allegations of plaintiff's complaint.

From what has already been said, it sufficiently appears that defendant's remedy to obtain a jury trial upon his counter-claim, was by special motion under section 970. Such motion, under Rule 81 of the General Rules of Practice, should have been made within ten days after joinder of issue. By failing to thus move for the framing of issues, and by giving notice of trial for the special term, the defendant waived his right to a jury trial under section 974. After it had been waived, and when the case was actually called for trial in its order upon the calendar, it was discretionary with the court to grant a postponement of the trial for the sole purpose of enabling the defendant to do what he might have done long before. The case discloses no reason why the exercise of that discretion should be disturbed. The defendant, by refusing to litigate his counter-claim and withdrawing from the case, preserved his right to enforce it in a separate and independent action.

The judgment appealed from should be affirmed, with costs.

VAN VORST, J., concurred.

Appellants' points.

GEORGE W. WOOD, RESPONDENT, v. RUDOLPH F. RABE, ET AL., IMPEADED WITH EMMA E. DURAND, ET AL., APPELLANTS.

Tender to stop interest—Payment into court—Equitable principles as to—Waiver by taking issue.

Courts of equity apply the rule as to payment into court according to the equities of each case.

In the case at bar, plaintiff was entitled, upon payment to one Maria Mulock of certain sums, to a re-conveyance of certain real estate, the legal title to which was, on the 23rd of February, 1860, and at the time of the commencement of the action, in said Maria Mulock, and of which she was in possession. On October 23, 1860, plaintiff tendered said sums, with interest to that date, to said Maria Mulock, and demanded a deed, which she refused to give. The complaint in the action, among other things, alleged a certain tender and refusal to give the deed, and contained an offer to pay the sums tendered, and prayed for a re-conveyance. The answer denied the tender alleged. Pending the action, Mrs. Mulock died, and it was revived against the defendants, the executors of her will, and her children. The court below rendered judgment decreeing the execution and delivery of a deed to the plaintiff, and that at the time of such delivery, plaintiff pay to her executors the said certain sums, with interest thereon to October 23, 1860.

Held, a proper judgment; that under the circumstances of the case, the actual payment into court was not necessary to work a stoppage of interest on October 23, 1860.

Also held, that by taking issue on the tender, payment into court was waived.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided December 7, 1885.

Appeal from judgment entered upon the decision of a judge at special term.

The facts appear in the opinion.

Rudolph F. Rabe, attorney, and *Algernon S. Sullivan*, of counsel for appellants, argued:—I. To make a tender effectual for any purpose, it is the duty of the party pleading it to deposit the money into court and allege that fact, and if this is not done, the authorities

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hold that the tender is a nullity. This is so both at law and in equity (*Becker v. Boon*, 61 *N. Y.* 317; *Harris v. Jex*, 55 *Ib.* 421; *Brown v. Ferguson*, 2 *Denio*, 196; *Bklyn Bk. v. De Grauw*, 23 *Wend.* 342; *Hills v. Place*, 48 *N. Y.* 520, 523; *French v. Simpson*, 25 *How. Pr.* 464; *Roosevelt v. Bull's Head Bk.*, 45 *Barb.* 579; *Tuthill v. Morris*, 81 *N. Y.* 94; *Shotwell's Exrs. v. Denman*, 1 *Coxe*, 202; *Arrowsmith v. Van Harlingen's Exrs.*, 1 *Ib.* 26; *Stockton v. Dundee, &c.*, 7 *C. E. Greene*, 56; *Shields v. Lozeau*, 7 *C. E. Greene [N. J.]* 447; *Gyles v. Hall*, 2 *P. Wms.* 378; *De Wolf v. Long*, 2 *Gilm. [Ill.]* 679; *Doyle v. Teas*, 4 *Scammon [Ill.]* 267; *Jarboe v. McAtee*, 7 *B. Mon. [Ky.]* 279; *Aulger v. Clay*, 109 *Ill.* 487; 31 *Alb. L. J.* 414; *Mathison v. Wilson*, 86 *Ill.* 51; *Carr v. Miner*, 92 *Id.* 604; *Ventres v. Cobb*, 105 *Id.* 33; *Pulsifer v. Shepard*, 36 *Ill.* 513; *Webster v. Baxter*, 35 *Id.* 211; *Park v. Wiley*, 67 *Ala.* 310; *Hamlett v. Tallman*, 30 *Ark.* 505; *Bissell v. Heyward*, 6 *Otto*, 580 [*U. S. S. C.*]; *Brock v. Jones*, 16 *Tex.* 461; *Mohn v. Stoner*, 11 *Iowa*, 30; *Barker v. Brink*, 5 *Ib.* 481; *Clark v. Mullenix*, 11 *Ind.* 532; *Jarboes v. McAtee's Heirs*, *supra*; *Dixon v. Clark*, 5 *Com. Bench R.* 365; *Claffin v. Hawes*, 8 *Mass.* 261; *Carley v. Vance*, 17 *Id.* 392).

II. Plaintiff may urge that the defendants have waived their rights to object to the defect in the plea and non-payment into court, by having taken issue upon the plaintiff's complaint, and cite in support of such claim, the case of *Sheridan v. Smith* (2 *Hill*, 538); but that case has been explained and distinguished in *Becker v. Boon* (61 *N. Y.* 317), where the same claim was made. It was there held by EARL, J., at p. 322, "that the answer contained another defense besides tender, and hence plaintiff was bound to receive it. He could not return it, or treat it as a nullity." So in the case at bar, the complaint contained other allegations besides that of tender, and defendants have a right to avail themselves thereof at any time. They could not return a complaint and treat it as a nullity; they were bound to answer, and did so. Their

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principal defense was in the beginning aimed at the law and equities of the case, to determine which it took two trials, two appeals to the general term, and one to the court of appeals.

III. The case of *Wheelock v. Tanner* (39 N. Y. 481), is not an authority against our contention. The finding in that case was that the tender was bad because accompanied by the condition that a mortgage should be discharged. The question was whether imposing the condition of the mortgage before the property should be delivered, vitiated the tender. There was no question but that the defendants were entitled to have the mortgage discharged before they could be required to deliver the wagons. The condition was one upon which the defendants had a right to rely, and that condition did not vitiate the tender. The condition was a condition precedent to the defendants' liability to pay, and a tender of payment on such condition was therefore a tender of full performance of the defendant's obligation. In the case at bar, there was no such condition precedent. The agreement was that Mrs. Muloch should re-convey the interest in said lands to her son whenever he should repay to her the sums of money expended and laid out. This imposed upon him a duty or obligation ; in fact, it was a condition precedent on his part, to be performed before he could demand a reconveyance. The amount of money which had to be refunded, in that way, in reality belonged to Mrs. Muloch. Is is a familiar doctrine in courts of equity that "he who seeks equity must do equity," and without that the court of equity will not extend its arm for the relief of the suitor. Though it was plaintiff's duty to repay the several sums of money to Mrs. Muloch, he simply offered it to her, and during all this litigation has had the use of it. He comes into court, and asks for the redemption of certain property held in trust for him, to obtain which property the trustee expended a certain amount of money ; she refused to convey to him ; she has had no benefit by reason of her refusal ; but the plaintiff

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has, because he has had the use of this money. It is well enough for him to stand on his equitable rights, and endeavor to obtain equitable relief, but that does not discharge him from the obligation to refund that which he has received, and not to traffic with the money, but to deposit it where the defendants may get it when they please. Law and equity both point out a way to be followed to save oneself from further interest and costs. This plaintiff had neglected to do, and he should therefore be chargeable with the consequences.

Deyo, Duer & Bauerdorf, attorneys, and *R. E. Deyo*, of counsel for respondent, argued:—I. The defendants have waived payment into court. The complaint alleged a tender. The answer denied that such a tender was ever made (*Sheriden v. Smith*, 2 *Hill*, 538 ; *Platner v. Lehman*, 26 *Hun*, 374).

II. Tender has been waived. This waives payment into court, because such payment is only made to keep a tender good. The answer denied the existence of the alleged contract, and alleged that she owned the fee. The question of tender thus becomes eliminated, because Mrs. Mulock assumed the responsibility of saying, "even if you did make the tender, I was not bound to convey." This position would make a tender an idle ceremony (*Crary v. Smith*, 2 *N. Y.* 60).

III. Mrs. Mulock claiming to own the property absolutely, and the premises being ample security, the amount to be received by her from the plaintiff would not have been ordered to be paid into court, even if a motion had been made to that effect (*Jenkins v. Hinman*, 5 *Paige*, 309 ; *Wyckoff v. Anthony*, 9 *Daly*, 417).

IV. Wood's tender and demand and Mrs. Mulock's refusal to perform stopped the running of interest against Wood. He was not bound to pay except upon receipt of a deed. Mrs. Mulock refused to give it. She broke her contract. The authorities fully support the respondent's position (*Wheelock v. Tanner*, 39 *N. Y.* 481 ; *Davis v.*

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Duffie, 8 *Bosw.* 691 ; Wilder v. Seelye, 8 *Barb.* 408 ; Hansard v. Robinson, 7 *B. & C.* 90 ; Smith v. Rockwell, 2 *Hill*, 482 ; Rowley v. Ball, 3 *Cow.* 303 ; *Chitty on Bills*, 260 ; *Strong on Bills*, §§ 448, 449 ; McDanel v. Kimbrell, 3 *Green [Iowa]*, 335 ; Williams v. Willhite, 3 *Head [Tenn.]* 344 ; Heywood v. Hartshorn, 55 *N. H.* 476 ; Washburn v. Dewey, 17 *Vt.* 92).

V. Wood did not make a tender in the strict legal sense, and it was improper for him to have done so. There is no exception to the rule that a legal tender must be unconditional (Wood v. Hitchcock, 20 *Wend.* 47 ; Breunich v. Weselman, 40 *Super. Ct.* 32). The only tender Wood did or could make was an offer to pay, conditioned on the delivery of the deed. He was not endeavoring to get rid of an obligation, but to enforce the performance of a contract.

VI. If Wood had paid into court the sum tendered, and had been beaten, he would have lost his property and his money also. Money once paid into court is irrevocably lost to the payer, although on the trial it is shown it was not owing (*Bacon's Abr.* Tender, N. 3 ; Read v. Mutual Co., 4 *Sandf.* 54).

VII. Wood made the offer so as to furnish evidence, on the trial, of his readiness to perform his part of the contract at the time when he demanded performance by his mother. In commencing his suit, he had his choice to recover damages at law, or to have a specific performance in equity (*Crary v. Smith*, 2 *N. Y.* 60). Had he sued in damages, it was not necessary to have tendered the money. He need only to have shown, at the trial, that at the time of demanding the deed, he was ready,—i. e., able,—to pay (*Wheeler v. Garcia*, 40 *N. Y.* 584 ; *Currie v. White*, 45 *Ib.* 822). He gave the highest proof of readiness by producing the money.

VIII. An examination of the cases cited by the appellants will show that where payment into court was held to be necessary, it was also held that the tender was or should have been unconditional, or was relied on to work

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an inequitable forfeiture of a lien. No doubt, great stress will be laid upon the cases of *Tuthill v. Morris* (81 N. Y. 94), and *Shields v. Lozear* (22 N. J. Equity [C. E. Green], 447); but they are clearly distinguishable.

BY THE COURT.—FREEDMAN, J.—The case has been re-tried in conformity with the decision of the court of appeals, reported in 96 N. Y. 414, and judgment given in favor of the plaintiff.

By this judgment it has been determined that Mrs. Mulock, in whom was vested the legal title to an undivided interest in certain real estate, held that title as trustee for the plaintiff, to whom she was bound to convey it on demand, and upon payment by the plaintiff of the sums advanced by her for the discharge of liens thereon, and of the amount of a judgment confessed by him to her.

Among other things it was found that, in point of fact, the plaintiff, in December, 1859, demanded a conveyance from Mrs. Mulock, which was refused, and that on October 23, 1860, he duly tendered to Mrs. Mulock the sum of \$4,322.67, which covered all the claims of Mrs. Mulock, together with interest thereon up to said 23d of October 1860, and again demanded a conveyance of her which was again refused.

Upon these facts it was held, as matter of law, that by reason of the said tender, demand and refusal on October 23, 1860, the defendants are not, nor are any of them, entitled to interest on the said claims of Mrs. Mulock, beyond the date of said tender, and that at the time of the execution and delivery of the conveyance which was decreed to be made, the defendants Rabe and Goodridge, as executors, &c., are entitled to receive from the plaintiff only the sum of \$3,225.50, with interest on \$2,005 from November 27, 1855, to October 23, 1860, on \$807.50 from December 22, 1855, to October 23, 1860, and on \$413 from February 16, 1856, to October 23, 1860.

By their points, the appellants have expressly limited

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the discussion to the question of their right to any interest since October 23, 1860.

Their contention is that the tender was insufficient to stop the running of interest from said date, because it was not followed up by a deposit of the money into court.

The common law rule of tender and bringing money into court, is stated in *Bacon's Abridgment*, title "Tender," as follows, viz: "It is in the general true, that if a debt or duty be not discharged by a tender and refusal, the tender must be pleaded with a *profert in curia*; for as the debt or duty continues, it is not enough for the party who pleads the transfer, to plead a tender and refusal with *uncore prist*, or with *uncore prist* together with *tout temps prist*, as the case may require; but he must also bring the money, or other thing which has been tendered, into court, that the other party may, if he please, accept thereof."

The rule originated in cases in which the defendant could not, and did not, deny the debt or duty on his part, but in which he nevertheless sought to defeat the action by a plea of tender before suit brought. It was held that, to be effectual for that purpose, the plea of tender had to be accompanied by a payment of the money into court, and a notice expressing the fact. The money then belonged to the plaintiff, and had to be paid to him, though he failed in the action, as he was bound to fail, if the tender was properly made, and of the correct amount. But unless the money was paid into court, the plaintiff was at liberty to treat the plea of tender as a nullity, and to sign judgment as for want of a plea.

That in all such cases, the tender must be kept good by the payment of the money into court, is also the law of this state (*Simpson v. French*, 25 *How. Pr.* 464; *Brooklyn Bank v. De Grauw*, 23 *Wend.* 341; *Brown v. Ferguson*, 2 *Den.* 196; *Hills v. Place*, 48 *N. Y.* 520; *Becker v. Boon*, 61 *Ib.* 317).

The statutes passed from time to time, and the exist-

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ing provisions of the Code of Civil Procedure, authorizing a tender and payment of the money into court by the defendant after suit brought, in order to affect the question of costs, and to stop the running of interest, are mere extensions of the rule.

Courts of equity, in matters not controlled by express statutory provisions, apply the rule according to the equities of each case, and irrespective of the question whether the party against whom it is to be enforced, is a plaintiff or a defendant in the case.

Thus, in *Roosevelt v. Bull's Head Bank* (45 Barb. 579), which was an action to foreclose a mortgage, the question was whether the plaintiff was entitled to recover the principal and all the interest, or interest only to the time of the tender. As it appeared that the notes tendered and refused, were immediately afterwards mixed by the bank with its other funds and used in its banking business, and yielded a profit, the plaintiff was held entitled to a judgment for the principal debt and all the interest.

On the other hand, it was held in *Jenkins v. Hinman* (5 Paige, 309), that upon a bill to redeem, where the complainant is in possession of the premises, which are an ample security for the amount admitted by him to be due, and the defendant insists that he is the absolute owner of the premises and that the complainant is not entitled to redeem, the court will not order the amount admitted to be due to be paid into court, nor appoint a receiver of the rents and profits of the premises pending the litigation, if the insolvency of the complainant is fully denied.

Many other cases might be referred to for the purpose of showing how exclusively the action of courts of equity is determined by the equities of each particular case in all matters not regulated by statute. But the two illustrations which were given, are sufficient for the present.

There are, no doubt, many cases, both at law and in equity, depending upon a tender, in which the money must be brought into court and the tender kept good.

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Every such case, however, implies an *unconditional* indebtedness by the party making the tender.

But in a case in which the acts of both parties should have concurred in the performance of the contract, and taken place simultaneously, it is enough for the plaintiff to show that he was ready, able and willing, and offered to perform his part, and that the defendant refused the other part. Having put the defendant in default, the plaintiff in such a case, if it be a case for specific performance, can go into equity with clean hands and demand specific performance without being obliged to keep the amount in court. And for similar reasons it has been held, in *Stevenson v. Maxwell* (2 N. Y. 408), that where, under a contract for the sale of lands, the purchase money is to be paid or secured, and the conveyance executed on a particular day, and neither party performs or offers to perform on the day, neither can maintain an action at law upon the contract, but that either may claim specific performance in equity, making in the bill the offer incumbent upon him. A tender may even become wholly unnecessary in consequence of a previous notice by the other party of refusal to perform (*Crary v. Smith*, 2 N. Y. 60).

At all events, a tender of performance may be accompanied with such conditions as were, by the terms of the contract between the parties, conditions precedent to be performed by the party to whom the tender is made. This doctrine was expressly laid down in *Wheelock v. Tanner* (39 N. Y. 481). The action was to foreclose a mortgage payable in money, with interest. The bond was capable of being paid in lumber wagons, at a stipulated price, to be delivered at such places as the mortgagee should designate. The wagons were ready for delivery at the time and place stipulated, and were not actually delivered because the mortgagee was not then ready to receive them, but requested that they should be kept until he was ready. Upon these facts, it was held that a further tender of the wagons was unnecessary, and that from and

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after the time when the wagons were ready to be delivered according to the terms of the contract, no further interest could be charged on the debt to be thus paid. And it also appearing that it was a condition of the bond and mortgage in suit, that the mortgagee was to pay off another mortgage held by one Tuttle, and that, if he did not, the defendants might suspend the payment of their bond and mortgage until the Tuttle mortgage was paid, it was further held that the tender of the wagons which was made by the defendants, was not bad because accompanied by the condition that the Tuttle mortgage should be discharged.

The case at bar is an equitable action. The plaintiff was not bound to pay except upon receipt of a conveyance. Mrs. Mulock refused to make and give it. She therefore committed a breach of the contract. Moreover, she was in the possession of plaintiffs' property by virtue of and under a deed to her which was absolute upon its face, and she thereafter continued in possession and enjoyed the fruits of ownership as if she were the absolute owner. Under these circumstances, it would be highly inequitable to award to the defendants, as her representatives, interest on the amount tendered by the plaintiff, and refused by her, without making them account for the benefits derived by Mrs. Mulock from such ownership. Presumably, such benefits would exceed the interest withheld.

Tuthill v. Morris (81 N. Y. 94), does not help the defendants. It was an action to restrain the defendant from selling certain premises in statutory proceedings to foreclose two mortgages thereon, and to have the same adjudged to be extinguished, and to require the defendant to cancel them of record, on the ground that the amount of the mortgages had been tendered and refused. It was, therefore, the case of a mortgagor in possession, and receiving the income of the property, and at the same time enjoying the use of the money for the payment of which, the bond and mortgage had been given. The sufficiency of the tender made was doubted, and it was

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held that, even if a sufficient tender had been made, which, according to strictly legal principles, discharged the lien and constituted a good defense against its enforcement, equity would nevertheless withhold the affirmative relief sought by the plaintiff, viz.: the extinguishment of the mortgage upon the record. In this connection, it was said that the most that could be *equitably* claimed, would be to relieve the plaintiff from the payment of interest and costs subsequently accruing, and to entitle him to this relief, he should have kept his tender good from the time it was made.

Other cases cited by the learned counsel for the defendants may, for similar reasons, be distinguished from the case at bar. They have not been overlooked, but they are not mentioned, because a detailed examination of them is deemed unnecessary.

Upon the whole case, it sufficiently appears that the disallowance of interest after October 23, 1860, was right and proper. An additional reason why the disallowance should be sustained, is that, even if Mrs. Mulock could have insisted upon payment into court of the money tendered, she waived her right by taking issue upon the tender. The complaint alleged full tender. In her answer, she denied that such a tender was ever made. This constituted a waiver under the authorities (*Platner v. Lehman*, 26 *Hun*, 374 ; *Sheriden v. Smith*, 2 *Hill*, 538).

The judgment should be affirmed, with costs.

SEDGWICK, Ch. J., concurred.

Statement of the Case.

SAMUEL VON WEIN, APPELLANT, v. THE SCOTTISH
UNION & NATIONAL INSURANCE Co., RESPOND-
ENT.

Insurance policy—cancellation of—notice of, how given.—Presumption as to credit for premium.

Where the terms of the policy of insurance provide that it may be canceled at any time by the company, on giving notice to that effect, such notice must be given to the insured in person, or to some one authorized by him to act as his agent to receive such notice.

A broker employed to procure insurance has no authority to accept or give a notice of cancellation of the policy. When he procures the insurance, his agency ends.

Although the policy provides that the broker procuring the insurance shall be deemed to be the agent of the insured *in any transaction relating to the insurance*, this condition applies only to matters occurring before the issuing of the policy.

The delivery of the policy to the insured without requiring the payment of the premium, raises a presumption that a credit was intended, and the policy is valid.

Where a credit has been given as above, it is not necessary for the company to return or tender the *pro rata* unearned premiums, as provided in the policy, to constitute a valid cancellation thereof, the company never having received the premium.

Before FREEDMAN and TRUAX, JJ.

Decided December 7, 1885.

Appeal from judgment entered on the verdict of a jury, and from an order denying a motion for a new trial on the minutes, on the grounds set forth in section 999 of the Code.

The action was brought to recover upon a policy of insurance for a loss sustained by fire. Among other defenses, the answer set up an allegation that, in accordance with a condition in the policy authorizing a cancellation thereof by the company at any time on notice, and on return or tender of *pro rata* unearned premiums, the policy was duly canceled prior to the loss in question. It also alleged that the policy contained provisions that

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the company should not be liable until the actual payment of the premium, and that no officer, agent or representative of the company should be held to have waived any of the terms and conditions of the policy, unless such waiver should be indorsed thereon in writing; and also alleged that plaintiff had not paid said premium.

The policy was put in evidence, and contained the provisions referred to.

Other facts appear in the opinion.

Benno Loewy, for appellant.—I. The policy in suit was in force and of binding effect, even though no premium had ever been paid thereon (*Boehen v. Williamsburgh City Ins. Co.*, 35 *N. Y.* 131). The delivery of a policy without requiring payment, raises a presumption that a short credit is intended. Where it is to be inferred from the facts of the case that a credit is intended, the policy will be valid though the premium has not been paid (*Angell v. Hartford Fire Ins. Co.*, 59 *N. Y.* 171; *Hodge v. Security Ins. Co.*, 33 *Hun*, 589, and cases cited).

II. The policy in suit was never legally canceled, as the *pro rata* unearned premium had never been actually paid or tendered to the assured prior to the occurrence of the loss, as provided in the policy. The case of *White v. Connecticut Ins. Co.* (120 *Mass.* 330), is a parallel case. The insurance had been obtained through a broker who had a running account with the company's agent; the premium had not been paid; the policy contained the same clauses as that in suit. The defenses were that there had been no actual payment of the premium made necessary as a condition precedent to its validity; and second, that the risk was terminated before the fire, by notice from the company. The court says: "It is a fair inference, for all this, that the duly authorized agent of the company had accepted the individual credit of Hunt (the broker), as a payment of the required premium. It is not a question of waiver by parol agreement of an express stipulation in a written contract, within the cases

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cited by the defendant. It is rather a compliance with the condition required to give validity to the policy within a large class of cases, in which it is held sufficient (*Taylor v. Merchant Ins. Co.*, 9 *How.* 390 ; *Miller v. Life Ins. Co.*, 12 *Wall.* 285 ; *Sheldon v. Connecticut Life Ins. Co.*, 25 *Conn.* 207 ; *Bonton v. American Life Ins. Co.*, 25 *Ib.* 542) ;" and the court further held, as did also the court in *Bennett v. Maryland Fire Ins. Co.* (14 *Blatch.* 422), that the giving credit to a broker operates as a payment in legal effect of the premium, preventing cancellation by the company, *without paying or tendering the return premium.*

The authorities uniformly hold that there can be no cancellation of a policy when once in force, without the payment or tender of the unearned premiums (*Hathorn v. Germania Ins. Co.*, 55 *Barb.* 28 ; *Van Valkenburgh v. Lenox Fire Ins. Co.*, 51 *N. Y.* 465 ; *Ætna Ins. Co. v. Maguire*, 51 *Ill.* 342).

III. There was no cancellation of the policy, even if notice without repayment of the unearned premium had been sufficient, as there was no notice to or act of the assured. The clause in the policy, making the person who procures the insurance "the agent of the assured, in any transaction relating to this insurance," does not make such person the agent of the assured to give or receive notice of its termination (*White v. Connecticut Ins. Co.*, 120 *Mass.* 333 ; *Grace v. American Central Ins. Co.*, 109 *U. S.* 278 ; reversing *Id.* 16 *Blatch.* 433 ; *S. C.*, 8 *Rep.* 771 ; 7 *Ib.* 388 ; *Rothschild v. Am. Central Ins. Co.*, 74 *Mo.* 44 ; *First National Fire Ins. Co. v. Isett*, 14 *Rep.* 278 ; *Latoix v. Germania Ins. Co.*, 27 *La. Ann.* 113 ; *Hodge v. Security Ins. Co.*, 33 *Hun.* 583 ; *Van Valkenburgh v. Lenox Fire Ins. Co.*, 51 *N. Y.* 465 ; *Stilwell v. Mutual Life Ins. Co.*, 72 *Ib.* 385).

Wetmore & Jenner, for respondent.—I. The scope of Rieger's authority extended to the cancellation of the policy as well as the procurement. The policy provided

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that he should be deemed the agent of the assured "in any transaction relating to the insurance." This language is broad enough to cover the act of cancellation. Rieger's agency did not terminate with the procurement of the policies. It included at least the payment of the premiums, and did not terminate until the premiums were paid.

Although the policy had been delivered by the company to Rieger without the payment of the premium, and the policy would have been good because credit for the premium had been given to Rieger, it was competent for the company and Rieger, to whom the credit had been given, and until the premium had been paid, to stop the period of the credit and cancel the policy (*Armour v. Ins. Co.*, 47 *Super. Ct.* 352; *Standard Oil Co. v. Ins. Co.*, 64 *N. Y.* 85).

II. The agreement of the company and Rieger operated to cancel the policy. Rieger, the broker, went to the office of the company and said that Mr. Von Wien "had insurance enough without, and I told Mr. Talbot that I wanted him to mark it off and consider it as canceled." Talbot (on behalf of the company) said, "We will mark it off and consider it off now; we want you to get the policies back as soon as you can." This was a present agreement of cancellation, which became operative from that moment to cancel the policy. By the terms of the policy a verbal notice or agreement was sufficient. The man who applied for the insurance asked for its cancellation. The policy did not require notice to be given to the assured himself. There was no premium to be refunded, none had been paid. That the notice was effective, see (*Story Agency*, § 140, and cases cited; *Standard Oil Co. v. Ins. Co.*, 64 *N. Y.* 85; *Armour v. Ins. Co.*, 47 *Super. Ct.* 352; *Ins. Co. v. Mueller*, 8 *Ins. L. J.* 263; *Bank of U. S. v. Davis*, 2 *Hill*, 461; *McEwen v. Ins. Co.*, 5 *Ib.* 101; *Fulton Bank v. Canal Co.*, 4 *Paige*, 187; *Boyd v. Vanderkemp*, 1 *Barb. Ch.* 273).

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BY THE COURT.—TRUAX, J.—The trial judge erred in allowing the defendant to prove that it had given notice of the cancellation of the policy to Rieger; or, in other words, it was error to hold that Rieger was the plaintiff's agent to whom notice of the cancellation of the policy could be given.

The evidence shows that Rieger was employed by the plaintiff to procure certain insurance, and that he procured that insurance. His employment—his agency—then ended, and notice to him was not notice to plaintiff.

The defendant claims that Spitzer was plaintiff's agent, and that Rieger was Spitzer's, and, therefore, plaintiff's agent. But there is no evidence that tends to show that Spitzer was plaintiff's agent for any other purpose than the purpose of procuring insurance. When the insurance was procured, his agency ended.

This view of the case is not affected by the clause of the policy that the insurance broker "shall be deemed to be the agent of the insured in any transaction relating to the insurance."

The giving notice of cancellation of the policy does not relate to the insurance; it relates to the cancellation of the contract of insurance, and not to the making of such contract. An authority to make a contract for another does not carry with it by implication, authority to cancel that contract (*Hodge v. Security Ins. Co.*, 33 *Hun*, 583; *Stilwell v. Mut. Life Ins. Co.*, 72 *N. Y.* 385; *Van Valkenburgh v. Lenox Fire Ins. Co.*, 51 *Id.* 465; *Grace v. American Central Ins. Co.*, 109 *U. S.* 278).

This rule works no hardship to the insurer. The right to cancel the contract of insurance still remains. It only requires that notice of cancellation shall be given to the insured, or to this agent to whom he has given an authority to receive such notice.

The cases of *Rohrbach v. Germania Fire Ins. Co.* (62 *N. Y.* 47), and *Alexander v. Germania Fire Ins. Co.* (66 *N. Y.* 464), deal with matters before the issuing of the policy (*Whited v. Germania Fire Ins. Co.*, 76 *N. Y.* 415),

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and the court of appeals says in the case last cited, that it has not yet extended the clauses of the policy quoted above, beyond matters that occurred before the issuing of the policy (p. 419). I cannot find that it has extended that clause any farther since the decision of the *White* case.

This remark is to be borne in mind while considering the case of *Standard Oil Co. v. Triumph Ins. Co.* (64 *N. Y.* 85), in which case, the persons who procured the insurance were the plaintiff's agents generally for placing and keeping upon plaintiff's property a large line of insurance (p. 86), and they returned the policy for cancellation (p. 87). The question of notice of cancellation to an agent is not in that case.

The policy of insurance was delivered to the plaintiff without requiring the payment of the premium. This raises the presumption that a credit was intended and the policy is valid (*Washoe Tool Co. v. Hibernia Ins. Co.*, 66 *N. Y.* 613; *Angell v. Hartford Fire Ins. Co.*, 59 *Id.* 171; *Bowman v. Agricultural Ins. Co.*, 59 *Id.* 521). But the fact that credit was given, does not make it necessary for the defendant to offer to return a premium that it never had received.

The judgment and order appealed from are reversed, and a new trial is ordered, with costs to the appellant to abide the event.

FREEDMAN, J., concurred.

Statement of the Case.

CLAYTON PLATT, APPELLANT, v. THE RICHMOND,
YORK RIVER & CHESAPEAKE R. R. CO.,
RESPONDENT.

Common carriers.—Bill of lading—effect when put in evidence generally—clause limiting liability in case of fire.—Burden of proof.—Contracts—by what law to be tested.

In an action against a common carrier for loss of goods, where the bills of lading are put in evidence by plaintiff generally, and without limitation, it cannot be claimed on appeal that they do not constitute the contract between the parties.

Where the bill of lading contains a clause exempting the carrier from loss or damage by fire, unless such fire be proved to have occurred from the fraud or gross negligence of defendant or his agents, the burden is on plaintiff seeking to recover for such loss, to show that the fire occurred from the causes enumerated.

It appeared that the defendant was a Virginia corporation, and that its line was wholly operated, and the loss occurred in that state. The bill of lading in question containing the above limitation on the carrier's liability, was given in the state of South Carolina, and it appeared that by the laws of that state, no special contract shall "limit or affect the liability at common law of any railroad company within this state, for or in respect of any goods to be carried and conveyed by them." *Held*, that defendant not being a railroad company in the state of South Carolina, on the evidence herein was not bound by the laws of that state, and that the clause in the bill of lading limiting the carrier's liability was operative.

Before SEDGWICK, Ch. J., and TRUAX, J.

Decided December 7, 1885.

Appeal from a judgment in favor of defendant, entered on a verdict of a jury under the direction of the trial judge.

The action was brought to recover the value of sixty-five bales of cotton lost in transportation by the defendant, as a common carrier.

The facts appear in the opinion.

Chambers, Boughton & Prentiss, for appellant.

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Butler, Stillman & Hubbard, for respondent.

BY THE COURT.—TRUAX, J.—The bills of lading offered in evidence by the plaintiff are evidence of the terms of the contract between the parties thereto. It is true that on the argument before the general term, the plaintiff claimed that the bills of lading were not offered in evidence as contracts, but were offered merely as memorandums by which to identify the cotton in suit; but such claim was not made on the trial. The bills of lading were offered generally and without any limitation, and they were treated by the court and the parties to the action as the bills of lading for the cotton shipped by defendant to plaintiff's assignor, so that it is now too late for the plaintiff to claim that they do not constitute the contract under which the defendant received the cotton.

By this contract the defendant was exempted from any responsibility for any loss or damage arising from fire, unless such fire were proved to have occurred from the fraud or the gross negligence of the defendant or its agents. This put upon the plaintiff the burden of establishing the fact that the fire occurred "from the fraud or gross negligence" of the defendant, its agents or servants (*Whitworth v. Erie Railway Co.*, 87 N. Y. 413). But the evidence shows conclusively that the fire occurred without any fraud or gross negligence on the part of the defendant or its servants or agents, and it was not error to direct a verdict for the defendant unless, as claimed by the plaintiff, the contract is prohibited by the laws of the states where it was made.

The cotton was shipped from different places in Georgia, North Carolina and South Carolina, to the plaintiff's assignor in New York. The complaint alleges, and the answer admits that the defendant is a corporation created by and under the laws of the state of Virginia. The proof shows that the defendant's road extended from Richmond, Virginia, to West Point, in the same state. The defendant was acting in Virginia as a member of the

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Piedmont Air Line, and the other lines that received the goods in Georgia and North and South Carolina. The goods were destroyed in Virginia.

The plaintiff offered in evidence chapter 65, section 2, of the Revised Statutes of South Carolina (1873), which provides that no special contract shall "limit or affect the liability at common law of any railroad company within this state for, or in respect of any goods to be carried and conveyed by them." But the defendant is not a railroad company within the state of South Carolina, and on the evidence in this case is not bound by the laws of South Carolina.

The plaintiff also offered in evidence certain portions of the laws of Georgia which prohibit common carriers from limiting their legal liability by notice, but these laws also provide that the carrier "may make an express contract, and will then be governed thereby." This, we have seen, was done by the defendant in this case.

The only evidence before the trial court of the law of North Carolina on this point was the case of *Smith v. N. C. R. R. Co.* (64 N. C. 235), but this case is an authority that a common carrier may in North Carolina limit his liability by special contract, as was done in this case.

I am of the opinion that there was no evidence before the trial court that either of the bills of lading which are the evidence of the contract between the plaintiff's assignor and the defendant, was prohibited by the laws of the state in which the bill of lading was issued.

This view of the case renders it unnecessary for us to determine whether the defendant is, or is not entitled to the benefit to be derived from and under the policy of insurance mentioned in the evidence.

The judgment appealed from is affirmed, with costs.

SEDGWICK, Ch. J., concurred.

Statement of the Case.

HENRIETTA C. SMITH, APPELLANT, v. JOHN I. CORNELL, AS EXECUTOR AND TRUSTEE, &C., RESPONDENT.

Subrogation—Eventual liability of party seeking.

One whose own property is eventually liable for a claim, to the payment of which other property is applicable in the first instance, will not be subrogated in the place of the party who held such claim, and to whom the same had been paid out of the property of the party seeking a subrogation, as to the rights which, before such payment, he had to require satisfaction of such claim out of the property which in the first instance was applicable thereto.

Thus, two parcels of land were delivered to an executor, on a valid trust to receive and pay rents during certain lives, and the remainder in fee descended to the heir at law; at the testator's death, certain taxes were due and unpaid. Pursuant to a judgment of foreclosure and sale made June 11, 1883, as to one parcel, and a judgment of sale in an action for dower made September 20, 1883, as to the other, these taxes were paid out of the proceeds of sale (the executor not having previously paid them out of the personalty), and the surplus funds were paid to the executor as trustee. The testator died January 24, 1883, leaving sufficient personalty wherewith to pay these taxes, which were preferred debts. Letters testamentary were issued February 12, 1883. The heir at law commenced the action February, 1885, praying to be subrogated in the place of the authorities to whom such taxes were paid, as to the amount thereof, and that defendant pay the amount thereof with interest, to her. Defendant, by his answer, set up that he had received all the known assets or personal property of the testator, and that the admitted unpreferred claims against the estate were largely in excess of the assets received by him, including such surplus funds. Plaintiff demurred to the answer, as insufficient in the law.

Held, that the answer presented a good defense.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from judgment entered upon order overrul-

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ing demurrer to defendant's answer, and from such order.

The complaint avers that the plaintiff is the only child, and heir at law of Gershom B. Smith, deceased; that Gershom B. Smith died leaving a last will and testament, which was duly proved on February 12, 1883; that on the same day, the defendant qualified as executor; that by the third clause of the will, the said Smith devised certain premises owned by him in fee, and known as Nos. 18 and 20 Howard street, in this city, to the defendant Cornell as executor in trust to take charge of and collect the rents and income of such premises during the lifetime of two nephews, Thomas and Benjamin Oliphant, and to pay over to three nephews which were named, and upon the further trust, after the death of the two first named nephews, to convey the premises to certain parties named in the will, if they should then be living; that at the time of the death of the testator, No. 18 Howard street was subject to unpaid taxes, which, with interest, amounted to about \$2,615, and No. 20 Howard street was subject to unpaid taxes, amounting, with interest, to about \$1,570; that No. 20 Howard street was, at the time of the death, incumbered by two mortgages made by him, one for \$7,000, and the other for \$3,748; that after the death, an action was begun for the foreclosure of the mortgages upon No. 20 Howard street, and a judgment of foreclosure and sale rendered, under which the premises were sold, and out of the proceeds of sale, the amount of unpaid taxes upon the premises, viz., \$1,574, was paid, in accordance with the direction of the judgment; that there was a surplus of \$1,215, after payment of the taxes, the amount due upon the mortgage, and all other charges, which surplus was paid to the defendant as trustee under the third clause of the will; that the testator left a widow, Ann E. Smith, who became entitled to dower, and brought her action for it, and in that action judgment

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was rendered that No. 18 Howard street be sold, and it was accordingly sold on October 18, 1883, and from the proceeds the taxes unpaid upon the premises, were paid with interest, in the amount of \$2,615, in accordance with the directions of the judgment ; that after payment of all charges and expenses, there was a surplus of \$3,232, which was paid over to the defendant as trustee under the will ; that after the sales of both of the premises, the plaintiff began an action, in which a judgment was duly entered, declaring that the trust described in the third clause of the will, so far as it authorized the defendant to collect the rent of the premises Nos. 18 and 20 Howard street, during the lives of the two nephews, was a valid trust in lands, and vested in the defendant an estate in such lands for the joint lives of the two nephews, but that the trust to convey the fee after the termination of said two lives was not a lawful trust, and did not vest in the trustee any estate ; that upon the death of the testator, the fee descended to the plaintiff as sole heir at law, subject to the life estate described ; and it was further adjudged that each surplus above referred to, was to be deemed real estate impressed with the valid trust, and that, subject to the execution of such trust, the principal of said funds was vested in the plaintiff, and should be paid over to her upon the termination of such life estate, as the owner in fee of the land represented by such funds ; that the taxes hereinbefore referred to, in all \$4,185, were a debt or claim against the estate of the testator, which the defendant, as executor, was bound in law to have paid out of the personal estate of the testator in preference to and before payment of any other debts of less degree ; that the testator left personal estate to the amount of \$9,000 and upwards, and more than enough to pay said taxes, and by the neglect of the defendant to pay the same, the said taxes were paid from the said lands, in the manner before described by the complaint.

The complaint asked as relief that the plaintiff "may

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be subrogated in the place and stead of the authorities of the city of New York, to whom such taxes were paid, as to the amount thereof ; that such amount and interest thereon be adjudged to be a preferred claim against said estate in favor of the plaintiff as taxes due at the time of the death of the testator ; and that the defendant, as such executor of the will of said Gershom B. Smith, deceased, may be adjudged to pay the plaintiff the amount of said taxes and interest as such preferred claim, out of the personal estate of the deceased in his hands after deducting only his lawful commissions and the charges of administration."

The action was begun in March, 1885.

The answer alleged : " First, that the admitted claims of unpreferred creditors against the estate represented by him are largely in excess of the assets received by him as alleged in the complaint, and that defendant has received all the known assets or personal property belonging to the testator at the time of his death. Second, that said surplus funds were paid into the hands of the defendant pursuant to orders of the court entered in the actions of foreclosure and dower alleged in the complaint, on the application of this defendant and with plaintiff's consent, she being a party to said actions, as was also this defendant."

The plaintiff demurred to this as insufficient in law.

The court overruled the demurrer and ordered judgment for defendant dismissing complaint, with leave to plaintiff to withdraw demurrer on payment of costs.

The following opinion was rendered at special term:

INGRAHAM, J—" Assuming that the complaint alleges a good cause of action, I think the defense that the claims against the estate are largely in excess of the assets, including the amount of the surplus funds received by the executor as described in the complaint, is a good defense to the cause of action set up in the complaint.

" It is clear that the plaintiff would not be entitled to

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the judgment she demands. The trust in the will by the testator, so far as it authorizes the trustee to rent the property and collect the rents and profits, and to pay the same to the beneficiary named, is valid, and that vested the title to the land during the lives of the beneficiaries in the trustee. During such period, the trustee would therefore be entitled to the possession of the premises, and, under the judgment entered, would be entitled to the surplus realized on the sale of the premises. The only judgment that could be granted would be, that the executor pay to himself, as trustee under the will, the amount of the taxes paid, to be held under the valid trust contained in the will.

“The trustee would, therefore, be a devisee of the testator, and would be liable for his debts to the extent of the estate that was devised to him by the decedent (*Code*, § 1843).

“The demurrer admits that the admitted claims of the unpreferred creditors are in excess of the assets of the estate, including this fund.

“It is apparent, therefore, that the judgment directing the executor to hold this fund under the trust contained in the will, would merely render necessary another proceeding to compel the trustee to pay the debts of the estate out of the trust funds in his hands.

“In an action between the same parties to recover taxes on certain other real estate that had been purchased by plaintiff, the general term of this court appear to have held, that under such circumstances, the action could not be maintained.*

“I think, therefore, the demurrer should be overruled, with costs, plaintiff to have leave to withdraw demurrer on payment of costs.”

The plaintiff did not withdraw the demurrer, and judgment was thereupon entered, dismissing the complaint, with costs.

From such judgment plaintiff appeals.

* *Smith v. Cornell*, 51 *Super. Ct.* 354.

Appellant's points.

Stilwell & Swain, attorneys, and *Benjamin M. Stilwell*, of counsel for appellants, argued :—I. The plaintiff had an estate in the lands which were sold, and applied to the payment of the taxes in question, for which she was not liable, and which should have been paid by the defendant as executor, and is therefore entitled to subrogation, in the place and stead of the corporation authorities of the city, as a preferred creditor of the estate.

II. An executor is required by law, before paying any general creditor, to pay, out of the personal estate, all taxes imposed upon the lands of the testator, and unpaid at the time of his death ; and it is admitted that the defendant as such executor had in his hands sufficient funds to pay the taxes in question, and neglected to pay them, and they were collected from the plaintiff's land. Whether or not the claims of unpreferred creditors against the estate exceed the assets, is entirely immaterial. It cannot be claimed, that because the assets are not sufficient to pay the general creditors, the executor is excused from paying the preferred creditors, to pay whom he has abundant funds in hand. Nor can the defendant, as executor, claim an offset or counter-claim, against the plaintiff's claim or that of the defendant as trustee, on the ground that the plaintiff, as heir-at-law, or that the defendant, as devisee, may become liable for the general debts of the testator, because of the insufficiency of the assets. Neither the heir-at-law nor the devisee is liable to the executor, but only to creditors ; nor can the executor maintain any action against the heir-at-law, or devisee, to recover the value of the land descended (*Code*, § 1848). Even the creditors have no cause of action against the heir-at-law or devisee until the expiration of three years after the issue of letters testamentary (*Code*, § 1844), which time has not yet expired.

III. The real estate, upon which these taxes were imposed, having been sold under prior incumbrances, and the proceeds distributed, as required by law, no action could be taken by the executor in the surrogate's court,

Respondent's points.

under section 2750, to reach these lands or their proceeds, for the purpose of applying them to the payment of the debts. These proceeds could only be reached by creditors under sections 1848-9. The fact that the plaintiff as heir-at-law, and the defendant as trustee and devisee, are liable to the creditors of the testator, to the extent of the estate, right and interest in the real property which descended, or was devised to them, would seem to be a good reason why they should recover from the executor these taxes, which are in effect a part of the value of the real estate, in order that they may be in funds to pay the debts for which they are liable.

IV. The learned judge below, in holding, that to sustain this demurrer and give judgment for the plaintiff in this action, would only render necessary another proceeding to compel the trustee to pay the debts of the estate out of the funds in his hands, overlooked the fact that such proceedings against the devisee could be instituted by the creditors, and, after they had exhausted their remedy, against the heir-at-law (*Code*, § 1849). The fact that the plaintiff, or the defendant as her trustee, may hereafter, under certain contingencies, be called upon by creditors to account for the moneys recovered in this action, would seem to furnish no reason why the plaintiff and the defendant as her trustee should not recover the same from the executor. If the heir-at-law is responsible for the debts of the testator, it is not to be presumed that she will refuse to pay them, or that any action will be necessary to collect the same to the extent of her liability.

A. J. McCullough, attorney, and *Horace Secor*, of counsel for respondent, argued :—I. Even if plaintiff, as heir-at-law, were entitled to payment of these taxes, in preference to other debts, she would not be entitled to the judgment asked. In that event, the judgment would direct the defendant to add the amount of the taxes to the surplus funds already in his hands, and hold the

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entire amount upon the trust set out in the complaint, the life tenants having the same rights as plaintiff, as reversioner.

II. A complete answer to this action arises from the fact that the admitted claims against the estate represented by the defendant, are largely in excess of the assets received by him, including the amount of the surplus funds received by him. It therefore appears that if these taxes were paid out of the personalty, the decedent's real estate would have to be sold to pay his debts. As it is, this surplus will have to be applied to that purpose. So that, if plaintiff succeeded in this action, the amount of her recovery would be followed in a proceeding by the executor to apply it to the payment of testator's debts. Therefore, the dismissal of plaintiff's complaint saves circuitry of action, and under the rule which forbids circuitry in legal proceedings—*circuitus est evitandus*: in accordance with which a court of law will endeavor to prevent circuitry and multiplicity of suits, where the circumstances of the litigant parties are such that, on changing their relative positions of plaintiff, and defendant, the recovery by each would be equal in amount (*Broom's Leg. Max.* 343, *et seq.*). The demurrer was properly overruled, and the complaint dismissed.

PER CURIAM.—This judgment should be affirmed, for the reasons adduced by the learned judge below in his opinion.

It appears from the facts averred in the complaint and answer, that if the taxes had not been paid out of the proceeds of the real estate, the executor, in the ordinary performance of the duties of his office, would have paid, in the first instance, the taxes out of the personal estate, then he would have applied the remainder of the personal estate to the payment of unpreferred claims, and, there being a deficiency, would have sold in proper proceedings the land, so far as necessary to provide for the deficiency;

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or the creditors not paid, would have applied to have the land sold (*Code*, § 2749, *et seq.*).

The fact that before there appeared to be any deficiency, the property had been sold in actions of foreclosure and for dower, would not have affected the application of whatever surplus there might have been, with or without taxes first deducted; for that surplus would be treated as if it were real estate (*Code*, §§ 2797, 2798). And the application of the defendant's estate as trustee would have been postponed to the application in the first place of the remainder in fee in plaintiff (*Code*, § 2764).

As it stands, if the taxes be deemed paid, there will be a less deficiency of assets to pay the unpreferred claims, and the plaintiff's estate will be to that extent relieved from the former obligation to pay the deficiency. If the amount of taxes that have been paid were now separated from the personal estate, and placed in the defendant's hands as trustee, as real estate, it would, in the end, have to respond to the deficiency, that by the answer, admitted by the demurrer, it is certain there would be. And then the plaintiff would stand where she does now. In the end, the plaintiff will get all the interest she is entitled to have in the testator's personal or real estate. The defendant, as executor, represents the right of creditors, and can interpose any equity in their behalf that they could interpose in person. If these views be correct, this action is simply to change a method of administration, when the change asked will not benefit the plaintiff pecuniarily.

The judgment should be affirmed, with costs, with leave to plaintiff to withdraw demurrer upon payment of the costs of the demurrer, and of the appeal.

Statement of the Case.

WILLIAM A. PITT, RESPONDENT, v. AUGUSTUS C. DOWNING, APPELLANT.

Evidence insufficient to warrant a recovery.—Performance of contract—following directions, when justifies finding of.—No offer to return, using, effect of.

Plaintiff had three separate contracts with defendant for doing work and furnishing materials; on one he was to receive the cost of the labor and materials, and ten per cent. thereon; on the other two he was to receive a specific sum. To sustain his claim on the first contract, he proved in a certain manner the value of the work and materials; he also proved that the stipulated compensations in the other contracts would not give him ten per cent. on either of them; he then testified that the whole bill for everything done under all the contracts, did not net him a greater profit than ten per cent.

Held, insufficient to establish what the cost of the work and materials, under the first contract was, or what that cost, with ten per cent. added, would amount to, and not warranting a recovery on that contract.

The plaintiff contracted to put in a house a steam heating apparatus, which should properly heat it. Defendant claimed that the apparatus, as put in, did not properly heat the house. The testimony admitted of the construction that the failure so to heat was due to the size, kind and situation of the boiler, as to which plaintiff followed defendant's directions.

Held, that upon the finding of said facts, a finding that plaintiff had performed his agreement, was justified.

The not offering to return, using when such use is contemplated by the contract, to test whether the thing furnished comports with the contract, and the calling on the party furnishing to remedy defects, will not give an action on the contract if it has not been complied with; but may be used as evidence, in connection with all other pertinent facts bearing on the questions of waiver, or acceptance, or of performance.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from judgment in favor of plaintiff against defendant, entered on report of referee.

The facts appear in the opinion.

Opinion PER CURIAM.

Joseph W. Howe, attorney, and of counsel for appellant.

Arnoux, Rich & Woodford, attorneys, and of counsel for respondent.

PER CURIAM.—This action was brought to recover \$9,523.42, as a balance due the plaintiff for work done and materials furnished by plaintiff at request of defendant in plumbing, gas-fitting, steam-heating and roofing a dwelling-house of defendant. The plaintiff claimed to recover for the value of the work and materials furnished by him.

The answer averred that all the work and materials referred to in the complaint, were done and furnished under three separate special contracts. One related to plumbing and gas-fitting, and by it the plaintiff agreed to do the plumbing and gas-fitting for the cost of the labor and materials, with ten per cent. added. The second was for the roofing, and provided that the plaintiff should be paid \$568. The third related to the steam-heating apparatus, and in it the plaintiff contracted to put steam-heating apparatus in the house for the sum of about \$4,000, and agreed that he would put it in in a workmanlike manner, and that the same, when put in, should accomplish the purpose for which it was intended, namely, the proper warming and heating the said house.

The referee found that the gas-fitting and plumbing were done under a special contract, like that in the answer. This would entitle the plaintiff to recover the amount provided to be paid to him by that contract. In a certain manner he proved the value of the work and materials. As there would be no presumption that this value was cost and ten per cent., it would not be the measure of his recovery. He beyond this proved, that the stipulated compensation for the roofing, &c., would not give him ten per cent. profit, and for the steam-heating apparatus would not give ten per cent. profit, and then he testified that the whole bill for everything that he did on the house,

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including the two contracts, did not net him a greater profit than ten per cent. There was no other evidence on the subject. It could not be inferred, from the testimony given, that the charge for plumbing and gas-fitting did not include more than ten per cent. on the cost of the work and materials. As the referee based the plaintiff's recovery upon the special contract, and as there was no proof that the plaintiff's charges in his bill accorded with the stipulated compensation, there must be a reversal of the judgment.

As to the steam-heating apparatus, the referee found that the plaintiff contracted with the defendant to put a steam-heating apparatus in his house for \$3,936, which, when put in, should properly heat the house.

Undoubtedly, if the steam apparatus did not properly heat the house, the plaintiff would not have the right to recover the stipulated sum, unless he showed a sufficient excuse for any deficiency in that respect. The referee refused to find that the steam-heating apparatus did not properly heat the house, after having found that the plaintiff performed his agreement in respect to it. The defendant's counsel claims that the plaintiff's own testimony on this point admits that the apparatus was not sufficient, because it gives excuses for deficiencies in this respect. It appears, however, that these excuses consist of directions that were given by the defendant through his architect to make certain parts of the apparatus,—for instance, the boiler,—of a certain size and kind. The testimony admitted of the construction that if the apparatus failed to supply enough heat, it was due to the size and kind and situation of the boiler. If these followed the direction of the defendant, then the plaintiff's contract would in substance be that the apparatus was to heat the house as well as might be with the use of the boiler of the kind chosen by the defendant, placed according to the direction of defendant. If the referee found these facts to be as testified to by the plaintiff, he was justified in finding that the plaintiff had performed his agreement.

Opinion PER CURIAM.

The findings proceed in favor of plaintiff on another ground. It is found that "the steam-heating apparatus was completed by the winter of 1881-82, and was in use during that winter and subsequently. No offer to return any part of it was ever made by the defendant to the plaintiff, but the plaintiff was called upon by the defendant, and did from time to time do certain work upon it, with a view to remedying defects as they were discovered."

If the defendant did in effect accept the work, as satisfactory to him under the contract, there is no reason that he should not be liable for the contract price. This is said of this contract, in consideration of the uncertain condition of "properly heating" the house. To a certain extent that would be matter of opinion or judgment, and the defendant's acts might conclude him.

The mere using of the apparatus, inasmuch as such use was contemplated by the contract for the purpose of ascertaining if the house could be properly heated by it, and the calling upon the plaintiff to remedy defects, and then the omission to offer to return such parts as could be severed from the house without damage, provided the special contract had not been complied with, would not have given an action upon the contract. If, as the referee has found, the contract had been performed, that ends all doubt; but if not, the particular facts alluded to will not necessarily show a performance. They can be used as evidence in relation to whether there was a waiver of performance or an acceptance in fact with a waiver, and also, whether there had been performance, and as evidence they must be considered with all the other pertinent facts of the case (*Smith v. Brady*, 17 N. Y. 173). This case shows that in an action upon a special contract, performance or waiver of performance must be proved to uphold a recovery upon it. There is no question presented on this appeal as to the right of the plaintiff to recover for the reasonable value of the steam-heating fixture.

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No question has been made on this appeal as to the plaintiff's right to recover under the contract for roofing.

For the error in the judgment as to the plumbing and gas fitting, the judgment is reversed, and a new trial ordered, and the order of reference vacated, with costs of the appeal to abide the event.

HENRY A. WEEKS, INDIVIDUALLY, AND AS ADMINISTRATOR, &C. OF NATHANIEL T. WEEKS, DECEASED, AND AS EXECUTOR OF MARY WEEKS, DECEASED, RESPONDENT, v. CHARLES H. OSTRANDER, AS EXECUTOR OF CATHARINE WEEKS, DECEASED; AND JACOB WEEKS CORNWELL, AS EXECUTOR OF JACOB WEEKS, DECEASED, AND AS EXECUTOR OF CATHARINE WEEKS, DECEASED, APPELLANTS, IMPLEADED WITH GEORGE W. WEEKS, AS EXECUTOR, &C.

Res adjudicata—rival claimants to legacy.—Will, construction of.—Bequest of bond and mortgage subject to consent of testator's wife—direction to executors to cancel.

An adjudication in an action brought by one of two claimants of the same specific legacy to recover the same, is not binding upon the other claimant, he not being a party thereto; and it cannot be held that he is represented therein by the executor of the estate against whom the action is brought.

If, from an examination of the whole will, the intent of the testator is clear, and such intent is in danger by inapt or inaccurate modes of expression, it is the duty of the court to subordinate the language to the intention; and in such case the court may reject words and limitations, supply them or transpose them to get at the correct meaning.

Accordingly, where it appeared that the will contained a bequest to the testator's wife of "all my bonds and mortgages . . . subject to and charged as provided in the 26th section of my will," which section authorized and directed the executors to cancel and satisfy, for the consideration of one dollar, a bond and mortgage given to testator by M. and N. Weeks, provided the testator's wife should consent thereto; that an action was brought in the supreme court by the personal representatives of testator's wife against said executors, to recover the wife's legacies,

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to which action N. and M. Weeks were not parties, and in which, among other things, it was adjudged that said executors pay and turn over to the wife's estate the bond and mortgage in question; and it further appearing in this action, subsequently brought in behalf of N. and M. Week's estate against said executors to have said bond and mortgage declared canceled, and to obtain a discharge of record, etc., that testator's wife had consented in writing, to the cancellation of the bond and mortgage, which consent was delivered to said executors and the one dollar paid to them, and that they had refused to execute a satisfaction-piece.

Held, that the judgment in the supreme court action was not binding on N. and M. Weeks nor on plaintiff claiming under them.

Further held, that the provisions of the will were, in effect, a bequest of the bond and mortgage to N. and M. Weeks, subject to the consent of testator's wife, and that no discretion was invested in the executors, the direction as to them being absolute.

Further held, that no instrument in writing was necessary to discharge the mortgage, but by force and effect of the will, in compliance with its conditions, the debt for which the mortgage was given as security became satisfied and discharged, and with it the mortgage.

Further held, that plaintiff was entitled to judgment declaring the bond and mortgage satisfied, and directing that the same be canceled and discharged of record.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from judgment in favor of plaintiff, entered at special term.

The action was brought to obtain an adjudication that a certain bond and mortgage had been canceled and satisfied, as provided for in the will of Jacob Weeks, deceased, and to obtain a discharge of record of the mortgage, &c.

The facts are substantially as follows :

Jacob Weeks died September 9, 1881, leaving a widow, Catharine Weeks. At the time of his death he owned a bond and mortgage for \$15,000, made to him by his brother, Nathaniel T. Weeks, and Mary Weeks, his wife. Mary Weeks was then dead, having by her will devised the property affected by said mortgage to Nathaniel T. Weeks for life, with remainder to plaintiff (thereby

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appointed her executor), who was the only child and heir-at-law of said Nathaniel T. and Mary Weeks. Nathaniel T. Weeks died in the fall of 1883, intestate, and plaintiff was his administrator. The portions of Jacob Weeks' will applicable to this \$15,000 were as follows: "II. I give, devise and bequeath to my wife, Catharine Weeks, and her heirs forever, in lieu of her dower in my estate, and of all other claims whatsoever, . . . all my bonds and mortgages . . . except as hereafter otherwise specifically bequeathed and stated, and subject to and charged as provided in the twenty-sixth and thirtieth sections of this, my will. . . ." "XXVI. I authorize and direct my executors, within one year after my death, to cancel and satisfy, for the consideration of one dollar, the bond and mortgage of Mary and Nathaniel Weeks to Jacob Weeks, to secure the payment of fifteen thousand dollars, provided my wife, Catharine Weeks, shall consent thereto." The thirtieth section did not refer to the mortgage in question. "XXXII. I nominate and appoint my wife, Catharine Weeks, executrix; my adopted son, Jacob Weeks Cornwell, my nephew, Samuel Weeks, Jr., and George Washington Weeks, executors of this my last will and testament. . . ." The will was admitted to probate on or about September 20, 1881, and letters testamentary thereon were then granted to Catharine Weeks, Jacob Weeks Cornwell and George W. Weeks only. On September 30, 1881, Catharine Weeks signed, executed, acknowledged and delivered to Henry A. Weeks, who was then the owner in remainder of the property affected by said mortgage, and who was acting on his own behalf individually, and on behalf of Nathaniel T. Weeks, a written consent to the cancellation of said bond and mortgage, reciting said 26th clause of the will. This paper was delivered to the remaining two executors, to whom it was addressed, and the one dollar paid to them by Henry A. Weeks on October 1, 1881, George W. Weeks transacting that part of the business, and giving to Henry A. Weeks a receipt, signed by him as executor, &c.,

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referring to said 26th section of the will, and reciting the consent of the widow, &c. Catharine Weeks died April 7, 1882, leaving a will, by which she made the said Jacob W. Cornwell one of her executors, and her residuary legatee, and also named the defendants Charles H. Ostrander and George W. Weeks executors.

The remaining executors of the estate of Jacob Weeks refused to execute a satisfaction-piece of the bond and mortgage in question, whereupon this action was brought.

It appeared that prior hereto, in an action in the supreme court between the executors of Catharine Weeks, deceased, and the executors of Jacob Weeks, deceased, this plaintiff not being a party, it was adjudged that the said bond and mortgage were the property of the estate of Catharine Weeks, deceased, and that Charles H. Ostrander, as executor of Catharine Weeks, deceased, or he and his co-executor, should recover the same, and that in case of the failure of the executors, &c., of Jacob Weeks, deceased, to deliver over the said bond and mortgage to the said executors, &c., of Catharine Weeks, deceased, the executors of Jacob Weeks, deceased, should pay over the sum of \$15,000 as and for the value of the principal of that bond and mortgage.

Plaintiff's claim was resisted on the grounds that said adjudication was binding on plaintiff as being privy to the executors of Jacob Weeks, deceased; that there was no valid consent by Catharine Weeks to satisfy the mortgage, because the consent was neither evidenced by Mrs. Weeks joining in the execution of a satisfaction-piece, nor certified in writing on the satisfaction-piece, as was claimed to be required by the provisions of the Revised Statutes as to powers (3 R. S. Banks' 7th Ed. p. 2193, § 122); and that as the power was not exercised "within one year," the time named in the will, it could not now be exercised.

The following opinion was delivered at special term.

INGRAHAM, J.—The first question to be determined in this action is, whether or not the judgment of the

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supreme court in the action of Charles H. Ostrander, as executor, &c., against Jacob Weeks Cornwell and George W. Weeks, as executors, &c., is a bar to this action, and a conclusive determination of the questions at issue here.

That action was commenced by one of the executors of the last will and testament of Catharine Weeks, deceased, to compel the executors of the last will and testament of Jacob Weeks, her husband, to account for and pass over to the plaintiff in that action all of the property and money due to the estate of the said Catharine Weeks, deceased, from the estate of her husband, Jacob Weeks, deceased, and was in effect an action to recover the legacies left by the said Jacob Weeks to his wife, the said Catharine Weeks.

The plaintiff in this action was not a party to that action, and can only be bound by the judgment therein on the theory that he was represented by the executors of the estate of Jacob Weeks.

The authorities cited by the defendants holding that the executors of the estate represent the residuary estate, do not apply, because the executors in such a case represent the residuary estate for the purpose of protecting it against all prior claims upon it which might diminish its amount; and in an action either by a creditor or by a particular legatee, the executor is the representative of the estate, and as such represents the residuary legatees.

The case is, however, very different where two parties claim the same specific legacy, for, in that case, the estate itself is not increased or diminished by the determination of the controversy between the parties. The executor is simply as to the subject of such specific legacy, a stakeholder; he has no interest in the determination of the controversy as to whom the specific legacy is payable, and no case has been cited to me holding that under such circumstances one of the claimants to the legacy can be bound by the determination against the stakeholder in a contest to which he is not a party.

In *Cromer v. Pinkney* (3 *Barb. Ch.* 474), cited by

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defendants, the chancellor said: "The case is otherwise where one of the residuary legatees sues for his share of the estate, for, as an accounting of the estate must be taken in that case, the executor may insist that the other residuary legatees shall be brought before the court, to save him the trouble of an accounting the second time at their suit,"—showing that one of the two residuary legatees would not be bound by an accounting of the executor in an action to which he was not a party. There is no distinction between the case of the two residuary legatees and the case of two claimants to a specific legacy.

In this case, the defendant, Jacob Weeks Cornwell, is one of the executors of Jacob Weeks, is also one of the executors of Catharine Weeks, and is the residuary legatee of Catharine Weeks, and appears, therefore, to be the one who would be mainly benefited by a determination of this action in favor of the estate of Catharine Weeks; and it would be repugnant to every principle of justice to hold that a judgment obtained in an action, brought by him as executor of Catharine Weeks against himself as executor of Jacob Weeks, that a legacy given to another person not a party to such action, was his, would bar the legatee from maintaining an action to recover such legacy, yet if the defendants' position is sound, that would be the result.

On the refusal of the executor of an estate to pay to the legatee a specific legacy, the legatee has an action in his favor against the executor (*Code*, § 1819). And it would hardly be claimed to be a defense to such action that the executor had paid the legacy to another person.

The executors of the estate of Jacob Weeks cannot complain if they have to pay this mortgage under the judgment of the supreme court. They could have interpleaded, as to the bond and mortgage in controversy, the plaintiff in this action and brought him before the court where he could have protected his interests.

It becomes necessary, therefore, to construe the second and twenty-sixth clauses of the will of Jacob Weeks,

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deceased, and it is the duty of the court in construing the will to carry out, if possible, the intention of the testator. If from an examination of the whole will the intent of the testator is clear, and such intent is in danger by inapt or inaccurate modes of expression, it is the duty of the court to subordinate the language to the intention, and in such case the court may reject words and limitations, supply them or transpose them to get at the correct meaning (*Phillips v. Davies*, 92 N. Y. 199).

Now, taking the second and twenty-sixth clauses of this will together, it is clear that the intent of the testator was to give this bond and mortgage to Mary H. Weeks and Nathaniel Weeks, subject, however, to the consent of the wife being first obtained. The bequest to the wife by the second clause of the will "of all my bonds and mortgages," &c., is made subject to and charged as provided in the twenty-sixth section of the will, and by the twenty-sixth section of the will the executors are authorized and directed to cancel and satisfy for the consideration of one dollar, the said bond and mortgage, provided the testator's wife should consent thereto. No discretion was invested in the executors. The direction as to them was absolute, and, on the consent of the wife, the provisions of the twenty-sixth section took effect, and on the payment by Mary Weeks and Nathaniel Weeks of one dollar, the bond and mortgage were satisfied and discharged. Catharine Weeks consented. That consent in writing was delivered to the executors, and the one dollar paid to them. No instrument in writing was necessary to discharge the mortgage, but by the force and effect of the will, the debt for which the mortgage was given as security became satisfied.

A mortgage is simply a security for the payment of the bond, or other evidence of indebtedness, and any act which is sufficient to release the bond, discharges the mortgage. The payment of the bond satisfies and discharges the mortgage (*Remington Paper Co. v. O'Docharty*, 81 N. Y. 474). And the cancellation of the contract,

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to secure which the mortgage was given, cancels the mortgage (*Wanzer v. Carey*, 76 N. Y. 526).

In *Carpenter v. Soule* (88 N. Y. 251), the court of appeals held that the mortgagee, having delivered to the mortgagor without consideration a receipt for two thousand dollars to apply on the bond and mortgage, it was a gift of a part of the debt, and operated at once to extinguish it *pro tanto*, and canceled and discharged so much of the debt.

I have come, therefore, to the conclusion that the plain intent of the testator was that, on the consent of the wife, this bond and mortgage should be satisfied and discharged ; that it was in effect a bequest of the bond and mortgage to the plaintiff's testator, subject to the consent of Catharine Weeks ; and that, on the consent of the wife and the payment of the one dollar named, the twenty-sixth clause of the will took effect, and the bond and mortgage became satisfied and discharged.

An examination of the judgment of the supreme court shows that in that action several other questions were presented to the learned judge before whom the case was tried. Plaintiff was not before the court ; but, as between the parties before the court, it might be that the plaintiffs in that action were entitled to the bond and mortgage, so far as it was valid, and that the fifth conclusion of law in that action was that the defendant George W. Weeks, as executor of the last will and testament of Jacob Weeks, had failed to prove that Catharine Weeks, in her lifetime, executed any satisfaction-piece of the bond and mortgage for fifteen thousand dollars mentioned in the complaint, or any consent sufficient in law to authorize the executors of the will of the said Jacob Weeks, deceased, to cancel and satisfy the said bond and mortgage for the consideration of one dollar ; but in this action such proof has been supplied.

I am therefore of the opinion that the plaintiff is entitled to judgment declaring the bond and mortgage described in the complaint satisfied, and directing that the

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same be canceled and discharged of record, and that the plaintiff recover costs of this action against the defendants, the executors of Jacob Weeks, deceased.

Van Winkle, Candler & Jay, and *Flamen B. Candler*, for appellants.

Anderson & Man, and *Frederick H. Man*, for respondent.

Van Schaick, Gillender & Stoiber, and *A. H. Stoiber*, for defendant, George W. Weeks.

PER CURIAM.—The judgment appealed from should be affirmed, upon the opinion of the learned judge who tried the case at special term.

PEOPLE *ex rel.* RACHEL GORLITZ v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK.

New York City—Board of Education—power of to remove teachers without cause or opportunity to be heard.

Under § 1042 of the Consolidation Act (L. 1882, ch. 410),—providing that “any teacher may be removed by the Board of Education upon the recommendation of the city superintendent, etc.; but only by a vote of three-fourths of all the members of said board,”—the removal may be without cause asserted or shown, or opportunity to be heard against the removal.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 23, 1885.

Hearing upon the return to a writ of certiorari issued to review the proceedings of the Board of Education of the city of New York, whereby the relator was removed as teacher in the public schools of the city.

The facts appear in the opinion.

Opinion of the Court, by SEDGWICK, Ch. J.

Samuel D. Levy and Benno Loewy, for relator.

R. G. Beardslee, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—The relator was a teacher in a public school of this city, and was removed from her place as teacher by a vote of three-fourths of all the members of the Board of Education upon the recommendation of the city superintendent. The objection is made to this removal that it was without cause, or at least, sufficient cause.

The respondent maintains the legality of the removal under section 1042 of the Consolidation Act (*Laws* 1882, ch. 410), which is: "Any teacher may be removed by the Board of Education upon the recommendation of the city superintendent, &c.; but only by a vote of three-fourths of all the members of the said board."

That the construction of this statute is that the removal may be without cause, asserted or shown, or opportunity to be heard against the removal, is, if authority were needed, determined by *People ex rel. Gere v. Whitlock* (92 N. Y. 191). In that case, the statute (*Laws* 1881, ch. 559, § 1), declared, "The mayor of said city is hereby also authorized to remove from office any commissioner of said department for any cause sufficient to himself, but he shall forthwith make and transmit to the common council of said city, &c. a statement in writing, &c. of his reasons for such removal." The court said that the power of removal was expressly conferred upon the mayor, to be exercised as to him shall seem meet. "In *People ex rel. Mayor v. Nichols* (79 N. Y. 582), the statute requires not only that cause for removal should exist, but also that the officer should have an opportunity to be heard. The statute before us lacks both conditions. No opportunity to be heard is given, and it is enough if the mayor thinks there is sufficient cause. It may or may not exist except in his imagination, but his conclusion is final." In the opinion, *People ex rel. Sims v. Board of Fire Commissioners, &c.*, is referred to.

Opinion of the Court, by SEDGWICK, Ch. J.

In the case at bar, in conformity with the terms of the act, the city superintendent recommended the removal. The act did not require him to give a reason for the recommendation or for the proposed removal. He did give a reason; that is, the insubordination of the teacher. But by the act, he was, so far as his recommendation was concerned, the sole judge of the existence of the facts which constituted in his judgment, insubordination, and of their sufficiency to induce him to make the recommendation. The board was not necessarily to act in removing upon the reason the city superintendent gave. They might or might not get in any way, information as to the validity of the reason assigned. Any step they might take in appointing a committee was entirely for their own guidance. The action of the committee and the action of the board upon the report, do not furnish any matter for review; for the vote of three-fourths incontrovertibly shows that there was a removal as provided by the act.

The determination reviewed is confirmed, with costs.

VAN VORST and FREEDMAN, JJ., concurred.

MEMORANDA

OF

CASES NOT REPORTED IN FULL

RICHARD PANCOAST, ET AL., RESPONDENTS, v. JOHN
Y. SPOWERS, JR., IMPEADED, &C., APPELLANT.

Assignment for benefit of creditors, when held good as against levy under execution, the assignment being made and delivered prior, though not recorded till subsequent thereto.

Before TRUAX and O'GORMAN, JJ.

Decided May 26, 1885.

Appeal by defendant from judgment in favor of plaintiffs, entered upon the findings of a judge at special term.

The complaint alleged, and the court found, that an assignment was made to the defendant, who thereupon proceeded to take possession of the assigned property; that subsequently the plaintiffs recovered judgment against the assignors; that execution was issued on the judgment to the sheriff of the city and county of New York, and a levy was made upon the assigned property; and that thereafter the assignment was filed and recorded in the office of the clerk of the city and county of New York, the place where said assignors, as copartners, carried on their business.

The Court, at General Term, said:—"It was not necessary to the validity of the assignment that it should have been filed and recorded prior to the levy by the sheriff. The court of appeals has decided that a general assignment

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for the benefit of creditors takes effect from the time of its delivery ; that all requirements subsequent to the delivery are merely directory ; and that an omission to obey any of them does not make the assignment void (Warner v. Jaffray, 96 N. Y. 248).

P. Q. Eckerson, for appellant.

John L. Logan, for respondent.

Opinion by TRUAX, J. ; O'GORMAN, J., concurred.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

JOHN W. FLYNN, v. BERNARD GALLAGHER.

Master and servant.—Negligence.—Act of foreman in overloading scaffold, when deemed act of fellow servant.—Presumption of master's negligence from falling of scaffold unexplained.—Master not bound to rebut presumption of negligence when such evidence is supplied by plaintiff, the servant.—Appeal-book—construction phrase therein, "plaintiff's counsel asks among other things," etc.

Before SEDGWICK, Ch. J., and O'GORMAN, J.

Decided June 1, 1885.

Plaintiff's exception to the dismissal of the complaint ordered to be heard in first instance at general term.

Action for damages from alleged negligence of defendant

The testimony showed that the plaintiff, a workman employed by the defendant, was directed by the foreman of the latter to go upon a scaffold to do work there. The scaffold had been built under the order of the defendant. The scaffold fell while the plaintiff was at work upon it.

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The plaintiff fell to the ground, and was seriously hurt. The complaint proceeds upon a charge of negligence in the defendant in building and using the scaffold. The facts in evidence admitted the consideration of two positions. The one was that the defendant was negligent in respect of the construction of the scaffold, by reason of which it fell. The other was that the breaking down of the scaffold was caused by the negligence of the foreman of defendant, in ordering upon the scaffold to work so great a number of men that they made a weight which the scaffold was not fit to bear, although it was sufficient to bear the weight of a smaller number of workmen.

The Court at General Term (after stating the facts as above), said :—"It seems that strictly the exceptions of the plaintiff are confined to the facts that are pertinent to the second position. In opposing defendant's motion to dismiss the complaint, the plaintiff resisted it, by asking to be allowed to go to the jury on the question as to the overloading of the scaffold. The case does not show that he expressed to the court a desire to go to the jury upon any other question, unless that is evinced by the words of the case, namely : 'Plaintiff's counsel asks, among other things,' etc. These words are indefinite, and not calculated to apprise the court that the plaintiff rests upon any particular issue in the case.

"If the plaintiff be confined to the question indicated, it should be held that the act of the foreman in overloading, so to call it, the scaffold, was an act of the fellow servant of plaintiff, for which the defendant is not responsible to him (*Malone v. Hathaway*, 64 N. Y. 5).

"If, however, the other question may be examined, it is to be said that the plaintiff's own evidence showed that the defendant was not negligent in the construction of the scaffold. It may be assumed that the falling of the scaffold called for explanation, and that, without it, there would be a presumption that the scaffold had been negligently put up. If, however, the facts proven by the plaintiff showed there was no negligence in the construc-

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tion, the defendant was not called upon to repeat testimony already in the case. The plaintiff called a witness, by trade a carpenter. He proved that the falling was due to the breaking of a joist, one of the supports. By his testimony, there was no other point of weakness. The joist was a clear piece of white spruce that had begun to split about three feet from where it broke. There did not appear any signs of decay ; it was of about the usual size. Another of plaintiff's witnesses, also a carpenter, saw the joist after the accident. He testified that he noticed that it was not solid, there being a 'shake' in it, and that a 'shake' in a piece of wood a man does not very often notice. If this were all the testimony on the point, it would affirmatively appear that there was no negligence in selecting the joist that broke. The only testimony that could be adduced to vary this result, came from the second witness referred to. That testimony consisted of short sentences, which had an ambiguous application. After saying that a man does not often notice a 'shake,' he said of the shake, if it had been looked at, it wouldn't have been there. It is possible that the witness meant to say that if the joist had been looked at, it would not have been where it was in the scaffold. In answer to a question, 'state what was the condition of the joist or timber,' he said it looked suspicious ; 'any body that had a notion of wood could tell what it was.' If these parts of his testimony are the controlling matter in considering what was the effect of his evidence, it is to be seen that they do not show with any certainty what kind or degree of attention would have disclosed to those building the scaffold, that there was a shake in the joist. In reality, the most important fact he testified to, is that men do not often notice a 'shake.' There was nothing in his testimony which would have allowed a jury to disregard the evidence of plaintiff's first witness, for whose credibility the plaintiff vouched by calling him. That evidence was to the effect that the joist had the appearance of being clear, fair and strong."

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Louis J. Grant, for plaintiff.

Albert G. McDonald, for defendant.

Opinion by SEDGWICK, Ch. J. ; O'GORMAN, J., concurred.

Plaintiff's exception overruled, and judgment for defendant ordered that complaint be dismissed, with costs.

HENRY H. REMINGTON, RESPONDENT, v. CHARLES E. FISHER, ET AL., APPELLANTS.

Transfer to hinder, &c., creditors.—Purchase upon sale under execution, necessity of actual change of possession to rebut presumption of fraud, &c., effect of payment of valuable consideration.—Judge's charge.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 1, 1885.

Appeal from judgment in favor of plaintiff entered upon verdict of a jury, and from order denying defendants' motion for new trial.

Action for an alleged wrongful taking of certain goods. Plaintiff claimed title to them under and by virtue of a purchase made by him August 7, 1883, at a sheriff's sale under an execution upon a judgment recovered by him in a certain action in which he was plaintiff and Ettel & Mackintosh were defendants. Defendants now here, took the goods in January, 1884, under an attachment procured by them in an action commenced by them against Ettel & Mackintosh, and claimed they had a right to take them on the ground that the prior purchase by the plaintiff was fraudulent as against them. At the trial, plaintiff showed the purchase by himself as claimed, and that he paid a valuable consideration for the goods so purchased.

The Court at General Term (after stating the facts as

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above) said:—"If, in addition to this, it had also been clearly shown that there was an immediate and actual change of possession, the title of the plaintiff could only have been defeated by proof that his purchase was a participation in a scheme to hinder, delay or defraud the creditors of Ettel & Mackintosh, and the burden of proof in this respect would have been upon the defendants. But it also appeared that the goods so purchased were left with Mackintosh as plaintiff's agent, for the purposes of a sale for plaintiff's account, and that thereupon the business of Ettel & Mackintosh was continued by Mackintosh in his name, with the word "agent" behind it. Witnesses differed as to whether the whole business was so continued for the benefit of the plaintiff, or whether Mackintosh was the agent of the plaintiff only for the purpose of effecting a sale of the particular goods with some others, and at the same time carried on business for himself. This rendered it necessary that the question as to a change of possession should be submitted to the jury, and the question was so submitted to them upon all the facts and circumstances of the case. They were instructed that the burden of proof in the case depended entirely upon how they would determine the question of change of possession. As the uncontradicted evidence showed payment of a valuable consideration, this instruction, in view of what was said by the learned judges of the court of appeals who delivered the opinions in *Starin v. Kelly* (88 N. I. 418), and *Murphy v. Briggs* (89 *Ib.* 446), was probably more favorable to the defendants than it should have been. At any rate it was the most they could claim."

Isaac N. Miller, for appellants.

Morrison & Kennedy, for respondent.

Opinion by FREEDMAN, J.; SEDGWICK, Ch. J., and TRUAX, J., concurred.

The judgment and order affirmed, with costs.

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FERDINAND T. HOPKINS, APPELLANT, v. ALEXANDER V. DAVIDSON, AS SHERIFF, &C., RESPONDENT.

Claim and delivery—requisition in, no protection to sheriff in taking goods from person other than one proceeded against—possession by plaintiff as mortgagee, evidence as to.—When cause of action for wrongful detention cannot be sustained under complaint for wrongful taking.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 1, 1885.

Appeal by plaintiff from judgment entered against him for costs upon the verdict of a jury, and from order denying his motion upon the minutes for a new trial.

Action for an alleged wrongful taking of property. The plaintiff's rights arise out of a chattel mortgage executed to him by George B. Tucker upon the property in question, and upon the trial plaintiff claimed that under and by virtue of said chattel mortgage, which was payable on demand, he, through his agent Watson, had, on Saturday, October 6, 1883, taken possession of the property, and that, at the time of the taking by the sheriff, he, the plaintiff, was in the actual possession thereof. The defendant took the property on Monday, October 8, 1883, and he took it as sheriff in an action brought by Mary E. Tucker, the mother of George B. Tucker, against the said George B. Tucker, to recover the possession of the said property, to which action the plaintiff in the case at bar was not a party. The defendant claimed that at the time of such taking George B. Tucker was in possession.

The court at General Term (after stating the facts as above), said: "Upon this issue, the only material question was whether, at the time of the taking by the sheriff, the plaintiff, through his agent Watson, or George B. Tucker, was in possession. A requisition in claim and delivery proceedings is no protection to the sheriff in taking goods or chattels from any other person than the

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defendant proceeded against. In the enforcement of this rule, the learned judge who presided at the trial, narrowed the issue to the question of possession, and excluded all evidence as to whether or not the plaintiff had a *bona fide* title. True, a certified copy of the chattel mortgage on the one side, and some notes claimed to show payment on the other side, were received in evidence, but they were received only as part of the circumstances under which the plaintiff acquired possession, and the question as to the validity of the respective claims founded thereon, was expressly withdrawn from the consideration of the jury. Upon the issue thus litigated, the plaintiff gave evidence to the effect that on Saturday, October 6, 1883, his agent Watson, with a certified copy of the chattel mortgage and power of attorney indorsed thereon, proceeded to the premises of George B. Tucker to foreclose the mortgage, and then and there took possession of the property; that, while in the act of removing it, and at the urgent solicitation of George B. Tucker, Watson allowed the property to be taken back to Tucker's rooms; that Watson then put Mary Ryder, a servant in the house, in possession of the property, upon her promise and agreement to stay there and hold possession for him until the following Monday; that thereupon Watson went away; that he returned on Monday morning, and that while then waiting for George B. Tucker to make some settlement, the sheriff came and took the property. The defendant, on the other hand, gave evidence to the effect that Watson, after having taken possession on Saturday as claimed, departed from the premises without having put Mary Ryder in possession; that from that time George B. Tucker was again in possession; and that on the following Monday Watson had not regained possession before the sheriff took the property. The issue thus raised conceded that Watson had taken possession on Saturday, as claimed. The contested question of fact was whether, after having done so, he did or did not relinquish possession. This question was fairly submitted to

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the jury and by them determined in favor of the defendant. There was no error in this disposition of the case, and none of the exceptions taken by the plaintiff in the course of the trial is tenable, unless the point is well taken which will now be considered.

"The plaintiff insists that, because it further incidentally appeared that on Tuesday, October 9, 1883, an affidavit under section 1709 of the Code was served by the plaintiff upon the defendant, at which time the defendant had not yet delivered the property to Mary E. Tucker, and that thereafter the defendant delivered the said property to said Mary E. Tucker, without any indemnity against the claim of the plaintiff in this action, the plaintiff, if he had a *bona fide* title and right of immediate possession, had established a conversion for which the defendant was liable. The conversion thus claimed involves the concession that the sheriff rightfully took the property in the first instance. In that aspect of the case, the cause of action would be that, after a rightful taking, and while the plaintiff was out of possession, the plaintiff, as the true owner, and as such entitled to the immediate possession, duly demanded the return of the property, but that the sheriff wrongfully refused to return the same and unlawfully detained the same, &c. The answer to this contention is that the complaint does not set forth any such cause of action. It first charges that at the time therein referred to, the plaintiff was lawfully possessed of a certain personal property, being his own property, situated in the third flat of the house or premises known as No. 155 East Forty-eighth street, in the city of New York, &c.; and then it avers "that on or about October 8, 1883, at said city of New York, the defendant unlawfully took said property from the possession of the plaintiff, and carried the same away, and still unlawfully detains the same from the plaintiff, to plaintiff's damage, in the sum of seven hundred dollars." The premises referred to constituted the residence of George B. Tucker, and the plaintiff did not live or do business

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there, and as the words 'being his own property' are descriptive merely of the property which it is averred the plaintiff was possessed of, it may well be, as the defendant contends, that all the plaintiff relied upon was that at the time alleged he was lawfully possessed. But, be that as it may, it is clear that the only unlawful detention charged arose out of an unlawful taking. To make the cause of action now insisted on available, the plaintiff should at least have averred a detention after a due demand. This was not done. The defect is a substantial one (*Scofield v. Whitelegge*, 49 N. Y. 259). It nowhere appears that the point relating to this additional cause of action was even suggested to the learned judge who presided at the trial. But it does appear that plaintiff's attention was called to the fact that he ought to amend his complaint, if he desired to litigate the question whether or not he had a *bona fide* title, and that he refrained from asking leave to amend."

W. T. B. Milliken, for appellant.

W. Bourke Cockran, for respondents.

Opinion by FREEDMAN, J. ; SEDGWICK, Ch. J., and TRUAX, J., concurred.

Judgment and order affirmed, with costs.

ABIJAH CURTISS, RESPONDENT, v. WILLIAM P. MOORE, APPELLANT.

Evidence.—*Code Civ. Proc.* § 829.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 1, 1885.

Appeal from judgment in favor of plaintiff entered on the verdict of a jury, and from an order denying a motion

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for a new trial upon the minutes, on the ground that the verdict is against law and evidence, and contrary to the weight of evidence.

Plaintiff was the holder of a promissory note made by the defendant to the order of one Clifford W. Clarke, and by said Clarke indorsed and delivered to the plaintiff. Clarke died before the trial took place. On the trial the defendant, who had been called as a witness in his own behalf, was asked by his counsel two questions, which tended to show that the note in suit was given by the defendant to said Clarke, to take up a note on which defendant was bound. These questions were objected to on the ground that the defendant could not testify to a personal transaction between himself and the deceased, through whom the plaintiff derived his title to the note. The objection was sustained, and the defendant excepted.

The Court at General Term (after stating the facts as above), said :—"It was not error to exclude this testimony (§ 829, *Code* ; *Alexander v. Dutcher*, 70 *N. Y.* 385 ; *Church v. Howard*, 79 *Ib.* 415). . . The defendant offered in evidence the note which he claimed was the note to take up which the note in suit had been given. This was excluded as immaterial, and the defendant excepted. As their evidence then stood and now stands, this note had no bearing on the case. It was not error to exclude it."

William L. Flagg, for appellant.

J. Q. A. Johnson, for respondent.

Opinion by TRUAX, J.; SEDGWICK, Ch. J., and FREEDMAN, J., concurred.

Judgment and order affirmed, with costs.

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ROBERT J. GRAY, RESPONDENT, v. FRANCIS T. WALTON, APPELLANT.

Auction sale of chattels—failure of purchaser to remove property by time limited in terms of sale, and consequent loss thereof—when excusable—liability of vendor—implied warranty.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided June 5, 1885.

Appeal by defendant from judgment entered against him upon the verdict of a jury, and from order denying motion for a new trial.

Action to recover the value of certain goods purchased by plaintiff at an auction sale of the goods and chattels belonging to the St. James Hotel, which he could not get, although he had paid for them. The sale took place on April 24 and 25, 1883. It was conducted by an auctioneer, under the direction of the defendant. The terms of sale, as expressed on the cover of the catalogue, put in evidence by the plaintiff, were as follows: "Terms of sale. A satisfactory deposit required from all purchasers. All goods must be fully paid for before being removed; and, if not paid for within twenty-four hours after the sale, the deposit will be forfeited, the sale annulled, and goods resold for account of the purchaser. All goods are sold as they are, and no allowance will be made for damaged articles. All goods must be removed at purchaser's own cost and risk. Sale will also be made subject to terms as stated at time of sale."

It was also proved by the auctioneer and by his clerk that it was distinctly announced, at the opening of the sale and several times during the sale, that the goods would have to be removed before May 1, on account of the property then going into the possession of parties other than the defendant. The fact of such announcement having been so made, was uncontradicted, and was

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held by the court to be an undisputed fact in the case. A bill of the articles purchased was made out and delivered to the plaintiff on the evening of April 26. This bill the plaintiff claimed was erroneous in that he was therein charged with the sum of \$50 for each of two washing machines, when in fact, as he contended, he had purchased both for the sum of \$50. The plaintiff sought to have this error corrected, but the auctioneer was so busy, as he said, with the sale, that he was unable to see the plaintiff in regard to it until May 2, when an agreement in regard to this difference was effected. Then the plaintiff paid his bill, and the auctioneer stated to the plaintiff that the doors would be open in the afternoon, and that then he, the plaintiff, could get his goods. Plaintiff went on said afternoon for his goods, but could not get them, and thereupon immediately notified the auctioneer, who then promised that he would see to it that plaintiff should obtain the goods. The defendant received the money paid to the auctioneer. The plaintiff having made several other attempts to get his goods, which proved unavailing, and all applications to the auctioneer and the defendant for them having resulted in nothing but promises, this action was brought. As the plaintiff and the auctioneer disagreed upon the trial as to the terms of the settlement of May 2, the learned judge who presided at the trial, submitted to the jury the questions as to what the original agreement was, and in doing so instructed them that, if the plaintiff agreed to pay \$50 for each of the two machines, then it became his duty to remove his goods before May 1, and in such case he was not excused, by reason of the dispute which he had created, for not removing them before that time ; but that, on the other hand, if plaintiff's version of the transaction was the correct one, and he had bid \$50 for both machines, and it was so stated at the time to the auctioneer, the failure of the auctioneer to deliver a correct bill, and the subsequent negotiations based thereon, would excuse the plaintiff's neglect in not taking the goods before May 1.

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The Court at General Term (after stating the facts as above), said :—" Of this disposition the defendant has no right to complain. There was a conflict which could only be determined by the jury. If the plaintiff had the truth on his side, there was no complete contract between the parties until May 2, and till then he had no right to remove the goods. Agreement in respect to the terms of the contract and payment then completed the contract, and then, for the first time, the title passed, and the plaintiff became entitled to the goods. Under these circumstances the defendant impliedly warranted the title, for the sale was not a sale of a right of action, but a sale of the goods themselves, and if nothing had been said as to a delivery, the law would imply, as a part of the contract, a license to call for the goods and to take them away. But the evidence went beyond that. It showed that the defendant, through his agent, the auctioneer, at the time of the payment of the purchase money which the defendant subsequently accepted and retained, expressly agreed that the doors should be open in the afternoon of May 2, for the plaintiff to obtain his goods, and that after the plaintiff had thus called and failed to get the goods, further promises were made that he should have them. There was also evidence that the defendant delivered goods to other purchasers on May 2 and 3. Upon the whole case, therefore, there was abundant evidence to authorize the jury to find that the plaintiff was excusable in not having called for the goods before May 1, and, they having found so, their verdict should not be disturbed.

"The fact that the goods were sold to be removed at the risk and cost of the purchaser, cannot relieve the defendant from liability. If the goods had suffered injury during removal, the loss would have fallen on the plaintiff. But that is not the contention. The plaintiff could not get the goods which the defendant by his contract was bound to deliver, in any condition whatever.

"Upon the facts which the jury must be deemed to

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have found, the measure of damages is the actual value of the goods at the time of the failure of the defendant to deliver them ; viz., on May 2, 1883. In this respect the jury were correctly instructed and their verdict does not appear to be excessive.

James K. Hill, Wing & Shoudy, for appellant.

Jacob F. Miller, for respondent.

Opinion by FREEDMAN, J. ; SEDGWICK, Ch. J., concurred.

Judgment and order affirmed, with costs.

GEORGE MANLEY, ET AL., APPELLANTS, v. GEORGE H. STAYNER, RESPONDENT.

Liability of agent to party paying money for account of principal, for failure so to pay over.

Before SEDGWICK, Ch. J., FREEDMAN and TRUAX, JJ.

Decided June 19, 1885.

Appeal by plaintiffs from judgment dismissing the complaint upon the merits entered upon the report of a referee.

Action to recover the sum of \$5,000, directed by the plaintiffs to be paid to the Plata Verde Silver Mining Company, on a purchase, directed and understood by the plaintiffs to have been made by the plaintiffs from that company, of certain shares of its treasury stock, which sum plaintiffs claimed the defendant omitted to pay to the company, and, therefore, in law, applied to his own use.

The referee's opinion was as follows :—"HAMILTON COLE, Referee.—In the year 1880 the plaintiffs made, through one A. H. Lazare, a broker, certain inquiries

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concerning the Plata Verde Silver Mining Company, of Hiram P. Crosby, a director in said company. Lazare was informed, and communicated to plaintiffs the information obtained, that the company was capitalized at \$10,000,000, that there were ten thousand shares of treasury stock as a working capital, of which eight thousand had been sold at \$10 per share.

"The plaintiffs sent their check for \$5,000 payable to George H. Stayner, treasurer, and received in return five hundred shares of the stock of the company. Manley testifies that he intended to purchase five hundred shares of the two thousand shares of stock left in the treasury, but it is doubtful whether such was the agreement in fact made with the company through Lazare. The check sent by plaintiffs was received by John R. Lowther, the secretary of the company, and was by him delivered to the defendant. He indorsed the check as treasurer, and also individually, and deposited the same in his private bank account January 31, 1880. On February 4, 1880, he paid out the same, upon the request of John R. Lowther, secretary of the company, to Hilborn & Lawrence, upon their draft drawn upon said company. The claim of Hilborn & Lawrence was as follows: Robinson & Junkin claimed to own the mine. The agreement between them and the defendant and his associates, was that Robinson & Junkin were to sell Stayner and his associates three-fourths of the mine for \$750,000. The mine owners wanted money, not stock. In order to make the stock full-paid stock, all of it was issued in exchange for the property, then seventy-five thousand shares were set apart for Robinson & Junkin for their interest in the mine, but this stock was put in the hands of John R. Lowther, trustee, who was to sell the same for \$10 per share, and pay proceeds to Robinson & Junkin. Robinson & Junkin guaranteed their title to the mine. Hilborn & Lawrence made claim upon it, which the company settled by agreement to pay \$50,000, which was done. The \$5,000 paid by Stayner, February 4, 1880, was a part of the \$50,000

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agreed to be paid by the company to Hilborn & Lawrence for the release of their claims upon the mine. And the five hundred shares of stock received by the plaintiffs were a portion of the seventy-five thousand shares held by Lowther as trustee, and originally set apart for Robinson & Junkin. Whatever may have been the arrangement made between Crosby and the plaintiffs in regard to the five hundred shares of stock taken by them, it is not claimed that any information in regard to such arrangement was communicated to the defendant. So far as he was concerned, he received a check as officer of the company, deposited it in his private account, and paid out the proceeds upon an obligation of the company, without notice of any kind that the check was for any particular purpose. The complaint proceeded upon the theory that Stayner had sold to the plaintiff his own stock. It is not claimed that this is established. Upon the facts proved, I do not see that any individual liability on the part of the defendant is made out."

The Court at General Term, said :—"The findings of fact of the learned referee cannot be reversed, and the counsel for appellants does not claim that they should be. The result is that the judgment for defendant was not erroneous.

"The plaintiffs, through their agent, bought the shares in reality of Robinson & Junkin, although they may have intended to buy shares that belonged to the company, of the company. Accordingly, they did not pay the price of the shares to Robinson & Junkin or any agent of them, and did not intend to do that; but, believing that the company was the owner and seller, they drew a check to the defendant's order as treasurer, meaning that the payment of it over should be payment to the company. The referee has found that the defendant knew nothing of, and was not in any way connected with the sale to the plaintiffs. On such facts, it may be granted, that the defendant would be liable to an action if, when the check or its proceeds were in his possession, he refused to deliver

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either upon demand. The fact as found, is that some two years before demand, he had paid the proceeds of the check out for the use of the company, at the request of the secretary of the company. He was agent for the company. The money was paid to him only as agent, and after payment by him he was no longer liable. Under some circumstances, an action would not lie against him personally, if he had not paid over, for acts which he did only as agent (*Calvin v. Holbrook*, 2 *N. Y.* 126 ; *Hall v. Lauderdale*, 46 *Ib.* 70 ; *Mowatt v. McLean*, 1 *Wend.* 173 ; *Duff v. Buchanan*, 1 *Paige*, 453 ; *Lafarge v. Kneeland*, 7 *Cow.* 456 ; *Costigan v. Newland*, 12 *Barb.* 456).

"The most important fact as to the merits is that the defendant did pay the money out for the company, and in so doing complied with the request of plaintiffs. The appellants argue that before he made the payment which the referee finds to have been on account of the company, he had appropriated the check to his use by indorsing it as treasurer and then depositing it in his own bank account. The so-called appropriation was, on the facts, a means of keeping the money for the company's use."

Albert Stickney, for appellants.

M. W. Devine, for respondent.

Opinion by SEDGWICK, Ch. J.; FREEDMAN and TRUAX, JJ., concurred.

Judgment affirmed, with costs.

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ANNA J. ROGERS, APPELLANT, v. EDWARD SCHELL, RESPONDENT.

Money had and received—when action for will not lie.—Agreement with mortgagors of real property to bid in on foreclosure sale and hold for their benefit, the mortgagors to assign their interest in surplus to bidder—subsequent action of mortgagors to recover amount of surplus so assigned by them to purchaser.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from a judgment entered upon the report of a referee dismissing the plaintiff's complaint.

Action to recover \$6,298.87, claimed to have been received by the defendant to and for the use of the plaintiff and her assignors.

The referee found the following facts :—"In and prior to the year 1873, one John Rogers, father of the plaintiff, owned the fee of a lot lying between One hundred and eighty-second and One hundred and eighty-third streets, in the city of New York. The lot was mortgaged to the Manhattan Savings Bank. Rogers died July 17, 1871. The interest to the bank became in arrears. An understanding was had between Rogers' family, including plaintiff, who is one of his children, and the defendant, that the latter should purchase the lot at a sale thereof to be made under foreclosure of the mortgage aforesaid, for the benefit of the Rogers family, and upon a subsequent sale of it by defendant he should give to them any excess it might bring over the amount he should advance to cover the sum due on the foreclosure decree. If he bid more than the amount of the decree, the surplus should belong to him, and Rogers family would assign their interest in such surplus to him. The defendant bid a large sum in excess of the sum of the decree, and became

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the owner of the property, but for the benefit of the Rogers family. The members of this family assigned to him their interest in the surplus, and upon proper proceedings he presented it to be paid to him. He still holds the lot, and has exacted rent for it. No one of the Rogers family has paid taxes upon it since the defendant purchased it, nor has he received any interest upon the sum he paid. This action is instituted to recover the surplus money so as above received by him."

The referee found as conclusions of law: "That the above facts do not constitute such cause of action as is attempted by plaintiff to be made, nor as considered in connection with the pleadings, any cause of action, and that the motion to dismiss the complaint herein should be granted;" and directed judgment accordingly.

The only exception was to referee's conclusion of law that the complaint should be dismissed.

The Court at General Term, said:—"Upon the facts found by the referee, the conclusion reached by him is entirely correct. The agreement between the defendant and the Rogers family, provided, that if he should bid upon the foreclosure sale more than the amount of the decree, the surplus should belong to him. His bid was in excess of the amount of the decree; he paid it, and received back the surplus, under the arrangement, with the consent of all. To that he was entitled. Had the property, on a re-sale made by him, realized more than he paid, together with his disbursements on account of the property, the excess would have belonged to the family. But he has not re-sold. When he does sell, the plaintiff, or others entitled to the moneys realized on such re-sale, over and above what the defendant has paid on account thereof, will be entitled to the excess.

The defendant offered, in his answer, to convey the property to any person whom the parties in interest will designate, on being reimbursed the moneys he has paid for the same. A re-sale, if desired by the parties in interest, could doubtless be reached through an action brought

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for the purpose of compelling it. But that is not this action."

S. W. Fullerton, for appellant.

Ira D. Warren, for respondent.

Opinion by VAN VORST, J.; SEDGWICK, Ch. J., and FREEDMAN, J., concurred.

Judgment affirmed, with costs.

ROBERT SEAMAN, RESPONDENT, v. ANTHONY
McREYNOLDS, APPELLANT.

Motion denied on merits cannot be renewed without leave.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from order.

In the year 1883, the plaintiff, by motion, asked for the same relief as was demanded in the moving papers, upon which the order appealed from was made. No leave to renew the motion was applied for or granted.

The Court at General Term, said :—"That was a sufficient reason for dismissing the motion.

"A motion once denied upon the merits cannot be renewed without leave first obtained (*Jay v. De Groot*, 2 *Hun*, 205 ; *Dun v. Meserole*, 5 *Daly*, 434 ; *Cazneau v. Bryant*, 6 *Duer*, 668).

"Although these decisions are founded upon a rule of practice, still it has been adhered to, save in cases where the application is founded upon new and further facts (*Riggs v. Purcell*, 74 *N. Y.* 370). But this motion does not profess to be founded on additional facts, nor do the moving papers at all refer to the previous motion, or the disposition made of it."

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W. H. McDougall, for appellant.

H. M. Whitehead, for respondent.

Opinion by VAN VORST, J.; SEDGWICK, Ch. J., and FREEDMAN, J., concurred.

Order affirmed, with costs and disbursements.

GALEN W. LOVATT, RESPONDENT, *v.* ELLEN F. WATSON, ET AL., APPELLANTS.

Appeal from order sustaining or overruling demurrer will not lie.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from order of the special term, sustaining plaintiff's demurrer to the second and third defenses set forth in the defendant's answer.

The Court at General Term, said :—"No appeal lies from an order sustaining or overruling a demurrer. An interlocutory judgment should have been entered upon the judge's decision, and an appeal taken from it. So a final judgment entered upon the interlocutory judgment may be appealed from. In the case of an appeal from such an interlocutory judgment, the order upon which it was entered, and in the case of an appeal from such a final judgment, both the interlocutory judgment and the order may be reviewed, provided the notice of appeal is, upon its face, sufficient for the purpose. These points have been settled so clearly, that it seems surprising that any doubt should now exist (*Code*, §§ 1021, 1349; *Cambridge V. Nat. Bank v. Lynch*, 76 N. Y. 514; *Ligeois v. McCracken*, 22 Hun, 69; S. C., 83 N. Y. 624; *Church v. Amer. Rapid Tel. Co.*, 47 Super. Ct. 558; *Smith v. Rathbun*, 88 N. Y. 660)."

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A. B. Conger, for appellants.

E. P. Wilder, for respondent.

Opinion by VAN VORST, J.; SEDGWICK, Ch. J., and
FREEDMAN, J., concurred.

Appeal dismissed, with costs.

BURGESS, RESPONDENT, v. BURGESS, APPELLANT.

Divorce—provisions of General Rule 74 as to examination of plaintiff concerning matters therein set forth.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided December 7, 1885.

Appeal from judgment of divorce.

The conditions on which the defendant was permitted by an order of the special term to serve an amended answer, were not complied with, and thereafter the defendant stipulated to proceed to trial under the original pleadings. The trial took place before a referee who, on consent of the parties to a reference, had been appointed by the court to hear and determine the issues. In fact, the answer of the defendant did not create an issue, because it expressly admitted each and every allegation of the verified complaint, inclusive of the charges of several acts of adultery, and did not set up an affirmative defense. The testimony adduced before the referee by the plaintiff, which the defendant failed to controvert, fully established that in the months of August and October, 1884, the defendant had been guilty of adultery, and the circumstances under which the several acts of adultery had been committed, in themselves showed that said acts were committed without the knowledge, consent, connivance, privity or procurement of the plaintiff.

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The averments of the complaint, that five years had not elapsed since the plaintiff discovered the said acts of adultery, that the plaintiff did not voluntarily cohabit with the defendant, since the discovery by her of said acts, and that she did not condone the same, were also expressly admitted by the answer, and the circumstances of the case showed that they were true.

The Court at General Term (after stating the facts as above), said :—"Under the exceptional circumstances of this case, it was therefore not absolutely necessary that the plaintiff should have been specifically examined by the referee as to those allegations of her complaint, the insertion of which was called for simply by the general rules of the courts. Upon the whole case, the referee was justified in making the report he did, and the court at special term was right in confirming the report, and granting the appropriate judgment thereon. The points raised by the appellant are, under all the circumstances, of a purely technical character, and wholly without merit."

C. A. Burgess, appellant in person.

J. H. McCarthy, and *William King Hall*, for respondent.

Opinion by *FREEDMAN, J.*; *SEDGWICK, Ch. J.*, concurred.

Judgment affirmed, with costs.

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BERNARD HEIM, ET AL., RESPONDENTS, v. FREDERICK LINK, ET AL., APPELLANTS.

Referee—right of to disregard testimony of both sides on question of quantity, etc., and make independent finding.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from judgment in favor of plaintiffs, entered upon report of referee.

The controversy in this case arises upon a delivery by plaintiffs to defendants of three hundred and ten bellies, weighing two thousand seven hundred and thirty-six pounds, under a contract calling for about four thousand pounds of bellies at $9\frac{1}{2}$ cents per pound for heavy, and $11\frac{1}{2}$ cents for light smoking bellies, and the only question presented by the appeal is one of fact. It is how many of the bellies so delivered were light smoking, and how many were heavy bellies. All other questions of fact have been waived by not printing the evidence bearing upon them. Upon the point in dispute the plaintiffs claimed before the referee, that the bellies delivered were light smoking bellies, weighing two thousand seven hundred and thirty-six pounds, which, at $11\frac{1}{2}$ cents per pound, entitled them to \$321.48. The defendants claimed that nine hundred and thirty-one pounds were light smoking, and one thousand eight hundred and five pounds were fat or heavy bellies, and that consequently the judgment should be for only \$285.38.

The referee held that neither were right; that one thousand eight hundred and thirty-three pounds were light smoking, and nine hundred and three pounds were fat or heavy, which, under the price fixed by the contract for the two qualities, entitled the plaintiffs to a judgment for \$303.41.

The Court at General Term (after stating the facts as

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above), said :—“ For thus splitting the difference between the parties, the referee had no warrant in any testimony bearing directly upon the point, and, if it were necessary to the maintenance of the judgment that the finding should be sustained precisely as made, it perhaps could not be done even upon a balancing of probabilities disclosed by evidence. But no such precision is necessary. Upon the whole case, the evidence clearly preponderated in favor of the plaintiff, and the referee should have sustained their entire claim. If, therefore, he erred, he erred in favor of the defendants, and of this the defendants ought not to be heard to complain.”

L. A. Gould, for appellants.

Baldwin & Blackmar, for respondents.

Opinion by FREEDMAN, J.; SEDGWICK, Ch. J., and VAN VORST, J., concurred.

Judgment affirmed, with costs.

JAMES BROWN LORD, RESPONDENT, v. GEORGE
WELLS COMSTOCK, APPELLANT.

*Damages—breach of contract by architect in failing to build house as agreed
—measure of damages—loss of tenant.*

Before VAN VORST and FREEDMAN, JJ.

Decided December 7, 1885.

Appeal from order disallowing and striking out certain interrogatories proposed by defendant to be annexed to commission for examination of witness out of the state.

Action to recover for plaintiff's services as architect in altering one house, and in building another, for the defendant.

The answer admits the contract of employment, but sets

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up that by the terms of that contract, the new house was to be constructed for the use of, and to meet the ordinary requirements of, a small family of moderate means ; that the plaintiff so negligently and unskillfully constructed the same that, when completed, it did not answer said purposes ; and that in consequence thereof, the defendant lost a tenant at an annual rent of \$360, expended \$300 in alterations, and was damaged in his reputation as a landlord to the amount of \$1,000. The object of the excluded interrogatories was to examine the alleged lost tenant, not as to the rental value of the house during the time it took to make the alleged necessary alterations, but as to the making of his lease, a supposed breach by defendant of certain conditions on which said lease had been made, the tenant's consequent refusal to comply with his agreement, and certain conversations between the tenant and the defendant, or his agent.

The Court at General Term (after stating the facts as above), said :—"The whole line of this proposed testimony is clearly immaterial, for, admitting the charge of negligent and unskillful construction, the defendant's measure of damages can only be either the difference in value between the product of plaintiff's negligent and unskillful work, and the house as it should have been, or else the cost of remedying the defects, and, if time was of the essence of the contract, loss of rental value during the time required to make the necessary alterations. Unless time was of the essence of the contract, which does not appear, it was not legally within the contemplation of the parties that the house should be rented before it was placed completed in the possession of the defendant. And in no aspect of the case as disclosed by the pleadings, can the plaintiff be held responsible for the loss of a year's rent upon a lease, with the making of which he had nothing to do. All damages which, from a legal point of view, were not within the contemplation of the parties at the time of the making of the contract, are too remote (*Sparks v. Bassett*, 49 *Super. Ct.* 270)."

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George Carlton Comstock, for appellant.

Lord, Day & Lord, for respondent.

Opinion by FREEDMAN, J.; VAN VORST, J., concurred.

Order affirmed, with costs, &c.

NICHOLAS ALBERT, ET AL., RESPONDENTS, v. ALBERT BACK, ET AL., APPELLANTS.

WILLIAM S. TAYLOR, ET AL., RESPONDENTS, v. ALBERT BACK, ET AL., APPELLANTS.

Fraudulent assignment—lien of creditor's bill to set aside—when attaches on service of summons only—when funds still deemed in possession of assignee though check has been drawn to creditor's order and delivered to attorney for assignee, who has also received from creditor the evidences of his claim.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided December 7, 1885.

Appeal from order confirming, except as to a certain item of \$3,000, the report of a referee appointed to take the accounts of an assignee for the benefit of creditors.

The defendants Back and Fishel, on October 14, 1884, made a general assignment for the benefit of creditors to the defendant, Moritz Kellner, which assignment preferred, among other, one F. Fishel, a brother of one of the assignors, for the sum of \$3,000. Thereafter an action was commenced against the defendants herein by judgment creditors, other than the plaintiffs herein, to set aside said assignment as fraudulent and void as to creditors, and judgment was recovered in said action in favor of the plaintiffs therein. While that action was pending, to wit, on November 25, 1884, a check was drawn by the said assignee Kellner, to the order of the said preferred creditor, F. Fishel, to whom it was delivered, and

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it was thereupon indorsed by him and placed in the hands of Mr. Kurzman, who was the attorney for the assignee in the said suit to set aside the assignment, and had acted as his counsel under the assignment. The note representing Fishel's preference was also placed by him in Mr. Kurzman's hands, with instructions to collect the money on the check and pay the note. This check was not certified, and was, in fact, not paid until December 1. The proceeds of the check remained in the hands of Mr. Kurzman, who also retained the note given him by Fishel, and he stated that the money was not paid to Fishel because the suit herein came in between the drawing and payment of the check. This action was begun November 26, 1884, by the service of a summons upon all the defendants, and the defendant Kellner appeared through Mr. Kurzman November 28, 1884. The complaint was not served until after December 1, but it appears that the attorney for plaintiffs informed Mr. Kurzman a day or two before the service of the summons that he was about to begin an action in favor of these plaintiffs to set aside the assignment. Judgment was subsequently recovered in favor of the plaintiffs, declaring the assignment to be fraudulent, and directing the assignee to pay to Cephas G. Thompson, as receiver, all the funds coming into his hands as assignee, except his lawful disbursements and expenses, and said receiver was directed to pay the plaintiffs the amount of their claims. The referee appointed to pass the assignee's account allowed as a payment the \$3,000 heretofore mentioned. The court confirmed the referee's report, except as to this \$3,000, and directed the assignee to pay that sum to the receiver for the plaintiffs, from which direction this appeal is taken.

The following opinion was delivered at special term :

“VAN VORST, J.—Under all the facts and circumstances of this case, I must regard the moneys received on the check for \$3,000, which have not been paid over to the creditor, but which are still in the hands of the attor-

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ney under whose advice the check was drawn, and with whom it was left by the drawee for collection, as still in a position to be affected by this suit—in other words, as funds of the assigned estate to be controlled by the assignee under the judgment of this court. The attorney with whom the check was intrusted by the creditor was the attorney and counsel for the assignee. .

“The check, it is true, was drawn payable to the order of the creditor, who indorsed and delivered it to the attorney for collection, to whom he also gave the obligation which was the evidence of his claim against the assignors, the payment of which was provided for in the assignment. At this point of time, the attorney appeared to occupy the two-fold position as counsel for the assignee and as agent for the creditor to the extent of collecting the moneys on the check for him, but he did not, by the whole transaction, cease to represent the assignee.

“I cannot but regard the action of the assignee as designed to frustrate this action, which was about to be brought, and of which the attorney and counsel for the assignee had already been advised. Of this notice to his attorney, the assignee presumably had information.

“An action in favor of another creditor seeking to impeach this assignment was then pending, and this one was on the eve of being commenced. The action of the assignee in giving this check on November 25, leads irresistibly to the conclusion that it was a step on his part to get rid of the moneys in his hands through the payment of the claim of a preferred creditor which the action about to be brought was designed among other things to prevent.

“Assignees, it is true, should move with reasonable diligence in closing up the trusts committed to them. But I am not aware that they are called upon to exercise extraordinary speed to prevent the lien of a creditor's action about to be commenced, especially when there is an action actually pending, which challenges the honesty and validity of the assignment.

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“Was the commencement of this action, by the service of a summons only, a notice to the assignee? Under all the facts, I think it was.

“The object of the action, it is true, was not stated in the summons, but the assignee must have known the purposes of the suit from the summons itself. He could have known that the plaintiffs had no other ground of complaint against him in connection with the assignor, as a co-defendant, than such as arose from the assignment in question, which was already the subject of inquiry in a legal proceeding.

“This question of notice is often one of difficulty, but I find none in this case. It would be idle to suppose for a moment that the assignee did not know, when the summons was served upon him, the object or purpose of the action in which he was impleaded with the assignor at the suit of a creditor of the latter. In any event, he was put upon inquiry.

“The question involved in the transaction is one of good faith, and where a party knows facts sufficient to put him upon inquiry he is supposed to have ascertained the extent of the rights claimed (*Williamson v. Brown*, 15 N. Y. 354).

“When the summons was served upon the assignee the moneys covered by the check still stood to his credit undrawn in the bank. He could have stopped its payment in an instant by a notice. The moneys were not drawn till afterwards. The check was no assignment of the funds mentioned, and the creditors' claims are still in the hands of the attorney.

“The creditor is a little nearer the money than he was before this suit was commenced, but not so near as that he may rightfully claim it in opposition to the demands of this suit, which challenges the assignee's right to dispose of it under the assignment which has been in this action, adjudged to be fraudulent and void as to the plaintiff.

“By this result the creditor, although he may be dis-

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appointed, is actually in no worse condition than he was before the check was drawn to his order. He has parted with no valuable consideration. He may be restored to his former position without damage. The unpaid note is still in the hands of his agent. The note may be returned to him and the money in effect to the assignee to meet the demand of this suit.

“The referee’s report, to the extent that it approves of the transaction above referred to, or credits the assignee with the payment of the money to the creditor, cannot be confirmed.”

Blumenstiel & Hirsch, for appellants.

S. F. Kneeland, for respondents.

PER CURIAM.—Order appealed from affirmed, with costs, &c., upon the opinion of the learned judge at special term.

ALBERT J. GRAEFFE, APPELLANT, v. CHARLES H. CURRIE, ET AL., RESPONDENTS.

Broker—when cause of action against as set forth in complaint, not deemed to depend on allegations of fiduciary relations.—Body execution in action against broker, &c.—when set aside.—Arrest—when grounds of deemed extrinsic to cause of action.

Before SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided December 28, 1885.

Appeal by plaintiff from order setting aside execution against defendant’s person.

The complaint, in addition to the allegation as to the deposit, &c., of plaintiff’s moneys, set forth in the opinion, contained the following :—“*Third.*—That said moneys were so deposited, allowed to remain, and to accumulate in the defendants’ hands, upon the agreement made between this plaintiff and the defendants, that the defendants should honestly and faithfully act as brokers

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for the plaintiff in the purchase and sale of grain, as the plaintiff would, from time to time, give them directions in respect thereto, and would report to the plaintiff honestly and faithfully the prices at which purchases were made or sales had, according to the custom of brokers.

“*Fourth.*—Upon information and belief, the plaintiff alleges that the defendants did not and had not honestly and faithfully invested said moneys as directed by the plaintiff, but the said defendants from time to time reported to this plaintiff certain false and fraudulent transactions, which they represented to the plaintiff to be honest and fair, and the plaintiff, relying upon such representations, believing the same to be true, permitted the use of his said moneys therein, and, as the result thereof, the defendants have reported to the plaintiff that they, in such investments, lost all of the plaintiff’s said moneys, save the sum of \$459.99.

“*Fifth.*—That immediately upon the discovery of the plaintiff that the said transactions of the defendants were false and fraudulent, and that he had been deceived by the false and fraudulent representations of the defendants, the plaintiff repudiated said transactions, and so notified the defendants, and on or about November 17, 1884, demanded the return to the plaintiff of the moneys so deposited, and allowed to remain and accumulate with the defendants as aforesaid, but the defendants, although promising to return the same to the plaintiff, have neglected and refused, and still neglect and refuse to pay the same to the plaintiff, and have returned or repaid to this plaintiff the sum of \$390 thereof only.”

Wherefore the plaintiff demands, &c.

The following opinion was delivered at special term :

“INGRAHAM, J.—The complaint alleges that on September 8, the plaintiff had on deposit with defendants the sum of \$456.25 ; that at various times between that date and October 18, 1884, plaintiff deposited with the defendants various sums of money, aggregating \$3,000, and

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about October 13, 1884, there was credited to plaintiff's account by defendants the sum of \$418.25, making in the aggregate the sum of \$3,875, moneys of the plaintiff in the hands of the defendants.

"This allegation, as it stands, would make the relation between the plaintiff and the defendants one simply of debtor and creditor, and the fact that the defendants were acting as the brokers of the plaintiff would bring the case within subdivision 3 of section 550 of the Code, which provides for cases where the right to arrest depends upon facts extrinsic to the cause of action.

"The allegation in the third clause of the complaint, that the said moneys were so deposited and allowed to remain and accumulate in the defendants' hands upon the agreement therein set forth, does not change the relation that existed between the parties. Nothing is alleged that would show that the plaintiff was entitled to recover the identical money that had been deposited with the defendants, and there is no allegation in the complaint that the money was converted by the defendants.

"To sustain the action, it was not necessary to allege in the complaint the relation that existed between the parties, or that the money was received by defendants as brokers or in a fiduciary capacity (*Wood v. Henry*, 40 *N. Y.* 126; *Segelken v. Meyer*, 94 *Ib.* 473).

"As appears by the case on appeal that was submitted to me on the argument of this motion, on the trial of the action no evidence was offered by the plaintiff to show that the money was paid to or received by the defendants under any special agreement; but the evidence of the plaintiff was, that on a certain day he had a balance with the defendants of so much, and that he gave them various sums in cash, aggregating \$3,456.25, the balance being made up by the profits on a wheat speculation. If the action had been one for a conversion of money, the plaintiff failed to make out such a cause of action on the trial, and the complaint would have been dismissed.

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“The subsequent allegations of fraud in the complaint do not bring the action within subdivision 4 of section 549 of the Code. The liability which the action was brought to enforce was contracted on the original deposit of the money with the defendants. There was no fraud in contracting or incurring the liability, and the allegations of fraud in the complaint were in relation to subsequent transactions which the defendants claim resulted in a loss to plaintiff.

“I think, therefore, the action is one under subdivision 3 of section 550, where the right to arrest depends upon facts extrinsic to the cause of action, and under section 1487, plaintiff was not authorized to issue an execution against the person unless the order of arrest had been granted and executed against the judgment debtor. As no order of arrest has been granted in this action, the execution was irregular, and must be set aside. Motion must therefore be granted, with \$10 costs.

Alex. Thain, for appellant.

George F. Duysters, for respondents.

PER CURIAM.—Order affirmed, with \$10 costs, on opinion below.

ADAM KAISER, APPELLANT, v. THE INDEPENDENT
ACCUMULATING FUND & BUILDING, &c., IM-
PLEADED, &c., RESPONDENT.

*Appeal from interlocutory judgment entered on order sustaining demurrer,
said order not being appealed from.*

Before SEDGWICK, Ch. J., and TRUAX, J.

Decided December 23, 1885.

Appeal from an interlocutory judgment, entered upon an order made at a special term, sustaining a demurrer to plaintiff's amended complaint. No appeal has been taken from the order sustaining the demurrer.

March 30, 1885.

Benno Loewy, for appellant.

Henry F. Lippold, for respondent.

PER CURIAM.—The judgment appealed from conforms to the order sustaining the demurrer, and which directs that the judgment appealed from should be entered. The judgment should be sustained until this order is reversed, but no appeal has been taken from the order. No leave to amend can be given on this appeal, if it were proper to give it after the plaintiff has had a former opportunity to amend, as he saw fit.

Judgment affirmed, with costs.

FREDERICK McLEWEE, respondent, *v.* CASSIUS H. READ, *et al.*, appellants.

Decided March 30, 1885. Appeal by defendants from judgment for plaintiff entered upon a verdict of a jury. Christopher Fine, for appellants. James C. Foley, for respondent. Before Sedgwick, Ch. J., and O'Gorman, J. Opinion by Sedgwick, Ch. J. Judgment and order affirmed, with costs.

BENJAMIN W. KING, respondent, *v.* AMOS A. SOUTHWICK, *et al.*, appellants.

Decided March 30, 1885. Appeal from judgment entered against both the defendants, on a verdict for \$507.31, and from an order denying a motion for a new trial. Granger & Backus, for appellants. James M. Ferguson, for respondent. Before Sedgwick, Ch. J., and O'Gorman, J. Opinion by O'Gorman, J.—Judgment reversed, and new trial ordered, with costs to abide the event of the action.

JAMES S. FLYNN, respondent, *v.* THE NEW YORK ELEVATED RY. Co., appellant.

Decided March 30, 1885. Appeal by defendant from judgment entered on verdict of jury for plaintiff. Julien

April 6, 1885—May 26, 1885.

T. Davies, for appellant. Louis J. Grant, for respondent. Before Sedgwick, Ch. J., O'Gorman and Ingraham, JJ. Per Curiam.—Judgment affirmed, with costs.

JOHN G. SCOTT *v.* PEDRO MONTELLS.

Decided April 6, 1885. Exceptions of both sides ordered to be heard at general term. Alfred I. Walker and David L. Walter, for plaintiff. Kent & Auerbach, and Geo. W. Cotterill, for defendant. Before Sedgwick, Ch. J., O'Gorman and Ingraham, JJ. Opinion by O'Gorman, J.—Exceptions overruled, and judgment for plaintiff ordered on verdict.

JOHN BEAN, an infant, respondent, *v.* JOSEPH P. REYNOLDS, appellant.

Decided April 13, 1885. Appeal from judgment for plaintiff, entered on verdict of a jury. I. T. Williams, for appellant. James E. Kelley, for respondent. Before O'Gorman and Ingraham, JJ. Per Curiam.—Judgment affirmed, with costs.

MATTHEW WHITE, respondent, *v.* JAMES RINTOUL, appellant.

Decided May 18, 1885. Appeal from judgment. Davenport & Leeds, for appellant. Robertson, Harman & Cuppia, for respondent. Before Sedgwick, Ch. J., Freedman and O'Gorman, JJ. Judgment affirmed, with costs.

DE LANCEY NICOLL, as receiver, *v.* JOHN J. SPOWERS, JR.

Decided May 26, 1885. Plaintiff's exception to dismissal of complaint ordered to be heard in the first instance at general term. Eugene H. Lewis, for plaintiff. P. Q. Eckerson, for the defendant. Per Curiam.—This case presents the same question as, and was argued and decided with *Pancoast v. Spowers* (*ante*, p. 523). The plaintiff's exception is overruled, and judgment is ordered for the defendant, with costs.

June 1, 1885.

ROWLAND N. HAZARD *et al.*, appellants, *v.* JOHN R. CASWELL, *et al.*, respondents.

Decided June 1, 1885. Appeal by plaintiffs from judgment in favor of defendants, entered upon findings and conclusion by a judge at special term. The action was to procure a judgment that defendants be enjoined from using a label and trade-mark, which the plaintiff claimed to have an exclusive right to use. The facts appear in the same case on appeal, 93 *N. Y.* 259, which was followed. Howard Mansfield and Henry E. Howland, for appellants. L. A. Lockwood and John L. Hill, for respondents. Before Sedgwick, Ch. J., and Freedman, J. Opinion by Sedgwick, Ch. J. Judgment affirmed, with costs.

HENRY GOTTGETREU, as assignee, &c., appellant, *v.* ALEXANDER V. DAVIDSON, as sheriff, &c., respondent.

Decided June 1, 1885. Appeal by plaintiff from judgment entered in favor of the defendant upon the verdict of a jury, and from order denying plaintiff's motion for a new trial. Oliver W. Beals, for appellant. W. Bourke Cockran, for respondent. Before Sedgwick, Ch. J., Freedman and Truax, JJ. Opinion by Freedman, J. Judgment and order affirmed, with costs.

HENRY C. DART, respondent, *v.* WILLIAM E. LAIMBEER, appellant.

Decided June 1, 1885. Appeal by defendant from judgment entered against him upon the verdict of a jury, and from order denying his motion for a new trial. Davies & Rapallo, for appellant. Wingate & Cullen, for respondent. Before Freedman and Truax, JJ. Opinion by Freedman, J.—Judgment and order affirmed, with costs.

June 1, 1885.

CATHARINE MURPHY, by guardian, respondent, *v.* THOMAS DONOHUE, appellant.

FELIX MURPHY, respondent, *v.* THOMAS DONOHUE, appellant.

Decided June 1, 1885. Two appeals by defendants from judgments for plaintiffs, entered on verdicts, and from orders denying defendant's motions for new trials. The questions in the respective appeals were the same. Thomas P. Wickes and George L. Sterling, for appellant. John Henry Hull, for respondent. Before Sedgwick, Ch. J., and Freedman, J. Per Curiam. — Judgments and orders affirmed, with costs.

THE CANFIELD RUBBER CO., appellant, *v.* ISAAC B. KLEINERT, respondent.

Decided June 1, 1885. Appeal from order denying plaintiff's motion to continue an injunction during the pendency of the action, and dissolving the preliminary injunction. Stearns & Curtis, for appellant. Stern & Myers, for respondent. Before Sedgwick, Ch. J., and Freedman, J. Opinion per Curiam.—Order affirmed, with costs.

BARKER PLACE, as executor, &c., respondent, *v.* JEDEDIAH K. HAYWARD, appellant.

Decided June 1, 1885. Appeal from order of February 3, 1885, denying defendant's motion to modify order of April 16, 1884. Before Sedgwick, Ch. J., Freedman and Truax, JJ. Per Curiam.—The order appealed from should be affirmed, with costs.

MARY E. POST, as executrix, &c., respondent, *v.* WILLIAM B. DINSMORE, as president, &c., appellant.

Decided June 1, 1885. Appeal by defendant from a judgment in favor of the plaintiff entered upon the verdict of a jury, and from an order denying defendant's motion on the minutes for a new trial. Charles M. Da

June 5, 1885—June 19, 1885.

Costa and William D. Guthrie, for appellant. Baldwin & Blackmar, for respondent. Before Sedgwick, Ch. J., and Freedman, J. Opinion by Freedman, J.—Judgment and order affirmed, with costs.

LOUIS WINDMÜLLER, *et al.*, respondents, *v.* HORACE K. THURBERG, *et al.*, appellants.

Decided June 5, 1885. Appeal by defendants from judgment entered upon the verdict of a jury, and from order denying motion for new trial. More, Arlington & More, for appellants. Cephas Brainerd, for respondents. Before Sedgwick, Ch. J., and Freedman, J. Opinion by Freedman, J.—Judgment and order affirmed, with costs.

MATTHEW FARLEY, appellant, *v.* THE MAYOR, &C. OF N. Y., respondents.

Decided June 19, 1885. Appeal by plaintiff from judgment for defendants entered upon a direction at trial term that complaint be dismissed, and also from order denying plaintiff's motion for a new trial made upon the minutes. Edward D. McCarthy, for appellant. David J. Dean, for respondents. The action was for damages from the alleged negligence of the defendants, in allowing to remain over a coal-hole in a public street, an iron cover, which was alleged to be unsafe for the use of foot-passengers, in walking over it. The plaintiff slipped upon it and fell. Opinions by Sedgwick, Ch. J., and Freedman, J. Judgment and order affirmed.

C. FAYETTE TAYLOR, *et al.*, respondents, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY, *et al.*, appellants.

Decided June 19, 1885. Appeal from an interlocutory judgment overruling demurrers to the supplemental complaint herein, and from the order overruling the demurrers (see same case, *ante*, p. 299). Davies & Rapallo,

October 5, 1885.

for appellants. Wm. W. Badger, for respondents. Before Sedgwick, Ch. J., and Truax, J. "Truax, J.—The plaintiffs were allowed by order to serve a supplemental complaint in addition to their former pleading, and therefore the supplemental and original complaint must be considered as one pleading. The defendants answered the original complaint and demurred to the supplemental complaint. The defendants had the right to answer or to demur to it. Having availed themselves of this right, they cannot at the same time demur to it. Judgment and order appealed from are affirmed, with costs, with leave to the defendants to withdraw demurrers, and to answer on payment of costs within twenty days after service of the order herein." Sedgwick, Ch. J., concurred.

MARGARET MORGAN v. JOHN B. McCAFFREY.

Decided October 5, 1885. This action was tried before the court and a jury. The court dismissed the complaint and ordered the plaintiff's exceptions to be heard in the first instance at the general term. Samuel D. Levy and Benno Loewy, for plaintiff. Joseph Stewart and Ambrose Monell, for defendant. Before Sedgwick, Ch. J., Freedman and Truax, JJ. Opinion by Truax, J. Plaintiff's exceptions overruled, and judgment ordered for defendant, with costs.

CHARLES W. ROMEYN, respondent, v. DANIEL E. SICKLES, appellant.

Decided October 5, 1885. Appeal from a judgment entered upon the report of a referee. Action to recover for services as architect in preparing plans, &c. Daniel P. Hays, for appellant. Theron G. Strong, for respondent. Before Freedman and Truax, JJ. Opinion Per Curiam.—Judgment affirmed, with costs, upon the opinion delivered by the referee.

December 7, 1885—December 23, 1885.

THE MANCHESTER PAPER Co., appellant, *v.* JACOB R. MOORE, administrator, &c., respondent.

Decided December 7, 1885. Appeal by plaintiff from judgment entered on report of referee, dismissing complaint upon the merits. Burnett and Whitney, for appellant. Martin & Smith, for respondent. Before Sedgwick, Ch. J., and Freedman, J. Per Curiam.—The judgment should be affirmed with costs, on the opinion of the referee.

HENRY ADAMS, respondent, *v.* HENRY A. BOWERMAN, *et al.*, appellants.

Decided December 7, 1885. Appeal from a judgment in favor of the plaintiff, entered upon the report of a referee. George W. Ellis, for appellants. Edward Merrill and Henry D. Hotchkiss, for respondent. Before Sedgwick, Ch. J., and Freedman, J. Opinion Per Curiam.—Judgment affirmed, with costs, upon the opinion of the referee.

B. R. SMITH, *et al.*, appellants, *v.* CHARLES C. HARDWICK, respondent.

Decided December 7, 1885. Appeal from judgment entered on referee's report, dismissing complaint on the merits. R. L. Harrison, for appellant. Butler, Stillman & Hubbard, for respondents. Before Sedgwick, Ch. J., and Freedman, J. Per Curiam.—The judgment appealed from should be affirmed upon the opinion of the referee.

M. WARREN SCOTT, appellant, *v.* JOHN M. BALDWIN, *et al.*, respondents.

Decided December 23, 1885. Appeal by plaintiff from judgment dismissing complaint upon the merits. Foster & Stephens, for appellant. P. & D. Mitchell, for respondents. Before Van Vorst and Freedman, JJ. Opinion by Freedman, J.—Judgment affirmed, with costs, upon the opinion of the chief judge, delivered at special term.

December 23, 1885.

WILLIAM M. ELIAS, appellant, v. ERASTUS WILSON,
repondent.

Decided December 23, 1885. Appeal by plaintiff from judgment dismissing the complaint, entered upon report of referee. L. B. Clark, for appellant. Charles A. Jackson, for respondent. Before Sedgwick, Ch. J., Freedman and Truax, JJ. Per Curiam.—Judgment affirmed, with costs.

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An action pending between the principal as plaintiff and his factor, the vendee of the factor, and the parties to whom the factor had assigned his claim against his vendee, as defendants, the complaint in which alleged a sale by the defendant factor to the defendant vendee of divers goods of the plaintiff, at low prices; that said prices had not been paid; that the parties defendant, to whom the factor had assigned his claim against the defendant vendee, took the transfer, with full notice of plaintiff's rights as alleged in the complaint, and prayed that plaintiff be adjudged entitled to receive the sum of money due from the defendant vendee, for the goods alleged in the complaint to have been sold to him; that the transferee of the factor's claim against the defendant vendee be restrained from collecting or receiving, and defendant vendee be restrained from paying over or delivering any part of the proceeds of such goods,—is no defense to an action

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1. An order made in an action tried before a judge without a jury, after the filing of his decision, denying a motion, made after such filing, to amend the answer, does not affect the final judgment, and is, therefore, not appealable under § 1316. *Callanan v. Gilman*, 112.
2. The court has inherent power to vacate a judgment, even after affirmance on appeal, and permit an amendment of the answer, the exercise of which power is in its discretion. *Born v. Schrenkheisen*, 219.
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- An order made in an action tried before a judge without a jury, after the filing of his decision, denying a motion, made after such filing, to amend the answer, does not affect the final judgment, and is, therefore, not appealable under § 1316. *Callanan v. Gilman*, 112.
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ARREST.

Execution against body, in action for personal injuries caused by negligence, may issue, though no order of arrest has been obtained. See *Ritterman v. Lopes*, 236.

When ground of arrest deemed extrinsic to cause of action set forth in complaint against person acting in fiduciary capacity.—Body execution, when set aside. See *Graeffe v. Currie*, 554.

ASSAULT AND BATTERY.

1. One who is present and instigates and encourages those who actually use physical violence, is liable for assault and battery. *Newman v. Marshall*, 202.
2. Parties committing an assault and battery, and expelling from possession by force one asserting by re-entry his right to possession after his rightful prior possession had been by them wrongfully

entered upon, cannot justify their action under a claim of right to possession. *Id.*

3. The plaintiff being in possession of premises, having been allowed by the defendant, under an agreement with him, to go into possession for the purpose of doing business there, and having therein considerable personal property, upon a demand being made by defendant (who claimed the right to immediate possession), to forthwith give up possession, and get his personal property together and remove it, asserted his right to remain, and went to the front door for the purpose of giving a message to a boy to take to his lawyer, and then the defendant and those acting with him shut the door and barred him out, whereupon he went to a back door, broke it open and entered, and thereupon the defendant and those with him, or those with him, instigated and encouraged by him, he being present, assaulted the plaintiff, and put him out by force; for which assault and battery the action was brought. *Held*, that the complaint was improperly dismissed, that as these facts did not incontrovertibly show that the plaintiff had voluntarily abandoned possession to the defendant, and as there was evidence to the effect that defendant pushed plaintiff, and also to the effect that he was present, and instigated the assault and battery by others, the plaintiff was entitled to a verdict of the jury as to whether he had abandoned possession before he attempted to re-enter through the back door, and as to whether the defendant was guilty of assault and battery. *Id.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Assignee for benefit of creditors, when not entitled to restrain proceedings

under execution, &c. against assigned property. See Chittenden v. Davidson, 421.

Assignment for benefit of creditors, when held good as against levy under execution, the assignment being made and delivered prior, though not recorded till subsequent thereto. See Pancoast v. Spowers, 523.

When funds still deemed in possession of assignee on service of summons in creditor's action, though check has been drawn to preferred creditor's order and given to attorney for assignee, who has also received the evidences of the creditor's claim. See Albert v. Back, 550.

ASSIGNMENT TO HINDER, &c. CREDITORS.

See FRAUD.

ATTACHMENT.

Venable v. N. Y. Bowery Fire Ins. Co. (49 Super. Ct. 481), followed, as to right of attaching creditor against debtor's assignee of chose in action. See Sulzbacher v. Natl. Shoe & Leather Bk., 269.

BANKS AND BANKING.

A national bank may purchase a factor's claim against his vendee, if the purchase is for banking purposes; the presumption being that the bank, in making the purchase, used its power for a lawful purpose, which presumption is not overcome by merely showing that the former owner of the claim transferred it. Comm. Bank v. Heilbronner, 388.

BILL OF LADING.

Nature and requisites of; what things the shipper may demand of master or owner shall be included therein; drafts to be accompanied by bills of lading purporting to be of particular article. See Bank of Montreal v. Recknagel, 334.

Bill of lading attached to draft—property of discounters of draft in

goods consigned, where consignee refuses to accept draft or goods. See *Am. Exchange v. Robertson*, 44.

Bill of lading put in evidence generally constitutes contract between parties; special clause limiting carrier's liability. See *Platt v. Richmond, &c. R. R. Co.*, 496.

BILL OF PARTICULARS.

1. The complaint contained three claims, viz.: for work, labor and service of plaintiff's assignor; for money had and received of plaintiff's assignor; for money paid, laid out and expended by plaintiff's assignor. The answer consisted of a general denial as to each claim, and affirmative defenses; 1st, payment to plaintiff's assignor for services rendered and moneys paid out; and, 2nd, that defendant had fully accounted for any moneys had and received for plaintiff's assignor. It appeared without contradiction, that plaintiff, upon demand, had furnished defendant with a bill of particulars, and therein had given him credit for every payment known to plaintiff to exist, and that, without a bill of particulars from defendant, the plaintiff would be in complete ignorance of the sums of money, items, dates, &c., that defendant will attempt to prove his payments to, and accountings with plaintiff's assignor. *Held*, that a case was presented which called for the discretionary power of the court within the rule laid down in *Witkowski v. Paramore* (93 N. Y. 467); *Dwight v. Germania Ins. Co.* (84 N. Y. 493); *Diossy v. Rust* (46 Super. Ct. 374); and the order requiring the defendant to furnish a bill of particulars was a proper exercise of the power conferred by § 531 of the Code of Civil Procedure. *Baremore v. Taylor*, 448.
2. *Held*, in this case, that malice could not be presumed from the

compliance with the order for a bill of particulars; and that that order was an adjudication in the original action that the defense there interposed, of which the particulars were ordered, was relevant; and that, consequently, the allegations in the bill of particulars were privileged. *Perzel v. Tousey*, 79.

BILL OF PEACE.

See *Equity*.

BILLS, NOTES AND CHECKS.

Where a bill of lading is delivered as collateral security, by the consignor to the discounter of a draft on the consignee, and the consignee refuses to accept the draft or the goods, or to pay the duties or freight, the holder of the draft and of the bill of lading as collateral, has no absolute legal right to the possession of the goods. *Am. Exchange v. Robertson*, 44.

BROKERS.

1. The phrase "stop order" means that the broker has received and is bound by a direction of his principals to sell at a price described, when that price is reached in the market. The price may be described by referring to contingencies and conditions. *Wronkow v. Clews*, 176.
2. But the phrase in a letter to his principal by a broker with discretion to sell stock bought by said broker on account of such principal, on a margin, stating the price at which the stock was then selling, calling for more margin to be put up on receipt of the letter, and adding, "In the meantime we enter stop order," means that the broker would stop entirely in everything and fix the transaction *in statu quo* until the principal should be heard from. If it could be regarded as being used in the ordinary sense, it could only mean that the broker

imposed on himself an obligation to sell at a price lower than that mentioned in his letter. In either event (the stock having subsequently to the letter been sold by the principal's order, and bringing less than the rate mentioned in the letter), the principal cannot charge the stock against the broker at the rate mentioned in the letter. *Ib.*

Change of ownership of real property, followed by sale contemplated theretofore, when does not affect broker's right to commissions thereon. See *Fox v. Byrnes*, 150.

Insurance broker, power of to give or receive notice of cancellation of policy. See *Von Wien v. Scottish Ins. Co.*, 490.

Cause of action against broker, when not deemed to depend on allegations as to fiduciary capacity. — Body, execution against, set aside. See *Graeffe v. Currie*, 554.

BUILDING CONTRACTS.

See **CONTRACTS ; DAMAGES.**

CERTIFICATES.

Official character, &c., of party taking affidavit in another state, sufficiency of certificate as to. See *Hyatt v. Snivel*, 1.

When architect's certificate not necessary though provided for by contract. See *Demarest v. Haide*, 398.

CLAIM AND DELIVERY.

Claim and delivery—requisition in, no protection to sheriff in taking goods from person other than one proceeded against. See *Hopkins v. Davidson*, 529.

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COLLECTOR OF THE PORT.

When collector of port not guilty of conversion in holding goods as bailees of common carrier. See *Am. Exchange v. Robertson*, 44.

COMMISSIONS.

Broker's right to commissions on sale real estate, when not affected by change of ownership pending negotiations. See *Fox v. Byrne*, 150.

COMMON CARRIER.

1. In an action against a common carrier for loss of goods where the

bills of lading are put in evidence by plaintiff generally, and without limitation, it cannot be claimed on appeal that they do not constitute the contract between the parties. *Platt v. Richmond, &c. R. R. Co.*, 496.

2. Where the bill of lading contains a clause exempting the carrier from loss or damage by fire, unless such fire be proved to have occurred from the fraud or gross negligence of defendant or his agents, the burden is on plaintiff seeking to recover for such loss, to show that the fire occurred from the causes enumerated. *Ib.*
3. It appeared that the defendant was a Virginia corporation, and that its line was wholly operated, and the loss occurred in that state. The bill of lading in question containing the above limitations on the carrier's liability, was given in the state of South Carolina, and it appeared that by the laws of that state, no special contract shall "limit or affect the liability at common law of any railroad company within this state, for or in respect of any goods to be carried and conveyed by them." *Held*, that defendant not being a railroad company in the state of South Carolina, on the evidence herein was not bound by the laws of that state, and that the clause in the bill of lading limiting the carrier's liability was operative. *Ib.*

When collector of port justified in holding goods as bailee for carrier, and subject to its lien for freight. See Am. Exchange v. Robertson, 44.

Telegraph companies not common carriers. See Macpherson v. Westn. Un. Tel. Co., 232.

See RAILROADS.

COMPLAINT.

See PLEADING.

CONSPIRACY.

Complaint for conspiracy, when in-

sufficient. See Douglass v. Winslow, 439.

CONTEMPTS.

1. A violation of a void injunction order is not punishable as contempt. *People ex rel. Roosevelt v. Edson*, 53.
2. The power of the mayor of the city of New York to appoint a commissioner of public works and a counsel to the corporation, is an executive power of the state vested in him by the constitution and laws, and involves the exercise of discretion. An *ex parte* injunction restraining him from exercising, or controlling him in the exercise of such powers of appointment is therefore void; and his disregard of it is not a contempt (by INGRAHAM, J.). *Ib.*

CONTRACTS.

1. Plaintiff and defendant, Francis S. Kinney, entered into an agreement, whereby plaintiff granted said defendant the exclusive use of a certain patented process for treating and curing tobacco during the continuance of the patent, and defendant agreed to pay one cent a pound for every pound of tobacco treated by him by said process; and whereby it was further agreed that should defendant fail to use the process in the treatment of 250,000 pounds of tobacco annually, the license for the exclusive use should cease; but defendant was still to have a license, not exclusive, to use the process in the manufacture of cigarettes and smoking tobacco. At the time of making this agreement, defendant was selling a cigarette, to which he had given the name of "Caporal." He proposed to call cigarettes made according to said process "Sweet Caporal," to which plaintiff assented, and he did make cigarettes according to that process and sell them under that title up to a certain period (up

to which all royalties were paid), after which, neither he nor his transferee, the other defendant, used the process, but they continued to sell cigarettes under the name of "Sweet Caporal." *Held*, that defendant, Francis S. Kinney, was not, under the agreement, bound to continue the use of the process, but was only bound to pay a royalty on such cigarettes as he should manufacture under the process; and that defendants, not having manufactured under that process since the period up to which all royalties had been paid, plaintiff had no claim against them for royalties. *Hornbostel v. Kinney*, 41.

2. As the word "Caporal" had been applied to cigarettes by defendant, Francis S. Kinney, before he had ever used the process in question, and as the word "Sweet" prefixed to it was only descriptive of quality, the plaintiff could have no right to the exclusive use of those words, either separately or in conjunction, as a trade-mark applicable to cigarettes; and consequently, as there was no evidence of any agreement, as to the use of the name of "Sweet Caporal" specially on cigarettes treated under the process in question, or that plaintiff or her assignees should have any exclusive right to use such a name as her trade-mark, plaintiff was not entitled to an injunction restraining defendants from using that name as applied to cigarettes. *Ib.*
3. The plaintiffs, who were manufacturers of printers' rollers and composition, bought out a firm in the same business, who, through the combined skill of defendant and a fellow-workman, had become important rivals and competitors, and at the same time plaintiffs induced the competing firm to get from each of these workmen an agreement, stated to be on a good and valu-

able consideration, not to exercise their trade thereafter "either in the city of New York or within a radius of 250 miles therefrom, so long as plaintiffs, their survivors or successors, shall continue such business or manufacture." In this action to restrain defendant, one of said workmen, from violating the agreement,—*Held*, that though a contract in partial restraint of trade, restricting it within certain reasonable limits or times, and confining it to particular persons, is valid if founded upon a good and valuable consideration, the contract in this case is clearly unreasonable as to space, and is also against the spirit, if not the letter, of the state statute, making it unlawful to accept from any journeyman or apprentice any contract that he shall not set up his trade in any particular place. *Bingham v. Maigne*, 90.

4. Where a contract provides for the payment to A. of commissions, if the sale of certain real estate be effected, and also provides that the purchaser may be found by A. or B., the agreement cannot be deemed an original contract with B., and he must recover, if at all, as assignee of A. *Randall v. Reynolds*, 145.
5. A valid settlement of a claim for commissions, as above made, between the parties, for value, is binding on a prior assignee of the claim, where the debtor has not been notified and is ignorant of said assignment at the time of the settlement. *Ib.*
6. A receipt may be explained as to the consideration part when the explanation is not inconsistent with the instrument; but so far as it is a contract having a settlement or release for its object, it cannot be varied or explained verbally—and this, whether the paper be sealed or not. *Ib.*
7. A paper acknowledging the receipt of \$500 "in full of matters from the beginning of the world

to this date," is not to be limited to any particular claim, unless, in addition to the general words, a particular claim be specified. *Id.*

8. Where a contract is made to pay a broker commissions on sale or exchange of real estate, a change of ownership in the property described in the contract, during the negotiations, followed by the exchange contemplated, does not necessarily release defendant, the contracting party, from payment of the commissions contracted for; nor does the fact that the negotiations were not successful at first, and were declared by defendant to be terminated, provided they are continued by defendant and are successful. *Fox v. Byrne*, 150.
9. In the case at bar, at the time of the employment of plaintiff as broker, defendant owned real estate, the subject of the contract, and requested the plaintiff, who had found a person willing to bargain with defendant, to tell him who was his principal, and he (defendant) would attend to the balance himself, and would pay plaintiff his full commissions if he made the exchange. Plaintiff introduced to defendant one S., and defendant, after negotiations for the exchange, which up to that point did not result in an agreement, told plaintiff that no exchange could be made; that it was all off, etc. Shortly thereafter, defendant with his son sought S. and told him that he had given his property to his son, and if he (S.) was for making a deal, he should make it with his son. Defendant actively participated in the negotiations, and a contract was drawn by him between S. and the son, and the matter consummated. *Held*, that the consideration for such a contract need not be a benefit to the promisor; it is enough if it is some detriment, expense, trouble to or service by another. Therefore, the fact that in the course of the negotiations the defendant gave the property to another, would be immaterial, the plaintiff having found a person who finally made the exchange through the negotiations of the defendant. *Further held*, that the gift of the property to the son, before the completion of the exchange, did not incontrovertibly prove that the exchange was not such as was contemplated by the contract, since it might have been the intention of defendant to procure for him through the efforts and service of the plaintiff, the additional advantage of a profitable exchange. *Id.*
10. One clause of an agreement called for a payment as a royalty of a specific sum for each article manufactured; a subsequent clause provided that no payment of royalties should be less than \$100, whether doors to cover that amount had been manufactured or not. *Held*, construing these clauses with an intermediate one calling for payments of royalties every six months, that plaintiff was entitled to receive \$100 every six months, whether any articles were manufactured or not. *Hackett v. Hackett, dec. Mfg. Co.*, 263.
11. A contract called for the building of a twelve-inch wall from the foundation to the top of the iron cornice or basement floor joist. It was, in fact, built only to the under-side of the girder. The upper stories settled from one to one and a half inches. Defendant claimed this was the result of not building said wall as high as called for, the neglect to do which was a serious and substantial violation of the contract. There was evidence tending to show that when this wall came to be built, it was found that it would be improper and unsafe to carry it up further than was in fact done; that to carry it up further would jeopardize the whole building; that the course actually

adopted was the proper one; that the settling was due to other causes, for which defendant's agents were responsible; it was also proved that the architect's superintendent directed this deviation because it was in his opinion necessary, and any other course would have caused the whole building to settle. *Held*, that it was properly submitted to the jury to determine whether the wall as built was a substantial performance, in good faith, of the contract. *Morton v. Harrison*, 305.

12. In the case at bar, there was evidence to the effect that defendant's agents frequently visited the building, and were active in their criticism of the work, and that their presence had placed them in a position where they must have known of the manner in which the provision of the contract as to the twelve-inch wall was being carried out. *Held*, that it was properly submitted to the jury to determine whether there had been a material variation without the consent of defendant, under a charge which instructed the jury that an acceptance might be implied from the acts of the party; but that the mere occupancy of a building is not a waiver of strict performance. *Id.*

13. Where there are changes in the plans, which, either of themselves, or by reason of necessitating other changes, or by reason of delay in directing them, or by reason of the delay of other workmen in furnishing the articles necessary for the change, or by reason of all these circumstances combined, delay the completion of the contract, or the owner's neglect to exercise an option which he retains at the proper time, causes delay, —*Held*, proper to submit to jury whether such delays excused non-completion by the day fixed, and if they did, then whether the work was completed within a

reasonable time, under a charge instructing them that if non-completion by the time fixed was excused, then the plaintiffs (the contractors) were to complete the work only within a reasonable time. *Id.*

14. Defendants, on December 1, 1881, requested plaintiff's agent to telegraph authority to Vogel & Co., Hong Kong, at six months, to draw for their account against consular invoice and full set of bills of lading of 2,500 bales of manila hemp, per "Robinson." Accordingly, plaintiff's agent, on the same day, telegraphed Vogel & Co., at Hong Kong, "Credit 608 six months, issued Recknagel . . . documents 2,500 bales manila hemp, per Robinson . . . Bank of Montreal." The next day, a letter of credit, dated December 1, 1881, was made out by plaintiff's agents, authorizing Vogel & Co., of Hong Kong, to value on plaintiff at London, against goods shipped per Robinson, for a specified sum, to be used as they might direct, for invoice cost of 2,500 bales of manila hemp, at four pounds per bale, on a basis of eight shillings sterling freight filled up in the bill of lading. The letter of credit required advices of the bills to be given in original and duplicate, and accompanied by bill of lading filled up to order of agents of Bank of Montreal, New York, with abstract of invoice indorsed thereon for the property shipped as above. A note at the foot required the invoice of shipments to be accompanied by U. S. consul's certificate. Defendants, by letter dated December 1, 1881, agreed "to provide for all bills which shall be drawn and accepted under" the letter of credit, "by payment of the amount thereof to you in New York." The letter of credit was sent by mail to Vogel & Co. Before receiving the letter of credit, Vogel & Co. drew their bills on plaintiff at

London. Each draft stated on its face that it was drawn against bales of manila hemp, was accompanied by bills of lading for bales of merchandise, and a letter of advice describing the shipment referred to in the draft as of "bales of hemp." On each bill of lading was indorsed what were called abstracts of invoices describing the shipment as of manila hemp. On these documents plaintiff's agent in London honored the three drafts. The shipment represented by one of the bills of lading against which one of the drafts was drawn, was in fact of a requisite number of bales of manila hemp. As to this draft, no question arose. The shipments represented by the other bills of lading were in fact of matting. The questions in the case arose as to the drafts drawn against these latter bills of lading. It appeared that the abstract of invoices indorsed on the bills of lading was made by Vogel & Co., after the bills had been signed and delivered to them by the captain and without his knowledge or consent. It also appeared that the size, outward appearance and packing of matting, and of manila, were entirely dissimilar, and the two were easily distinguishable. *Held*, that defendants' request, the telegram, and the letter of credit must all be considered together to know the agreement. So considering them, the agreement called, among other things, for bills of lading of manila hemp, as a condition precedent to the payment of bills drawn under the agreement, and the responsibility of defendants rested solely upon whether this condition precedent had been complied with. That the nature of the relation between Vogel & Co. and the defendants, or of the interest of defendants in the hemp, is therefore immaterial; so, also, is the fact that Vogel & Co. committed the fraud of shipping

matting instead of hemp, the agreement providing in substance for defendants' protection against the acts of their agents, if Vogel & Co. were agents. That it followed, since the bills of lading, against which the two drafts in question were drawn, were simply of "bales of merchandise," and since the shipments represented by such bills of lading were in fact of matting and not manila hemp, whereby a loss ensued, that plaintiff was not entitled to be reimbursed by defendants the money paid on such drafts. *Bank Montreal v. Recknagel*, 334.

15. In an action on a building contract to recover the reasonable value of certain extra work orally ordered by defendant, it appeared that under a provision of the specifications which were not annexed to the written contract, or signed by the parties, only the cost value (in the absence of a special agreement) of extra work, ordered in writing, could be demanded; but it further appeared, that the contract signed by the parties made no reference to the specification for the agreement as to the extra work, and itself contained a provision, that "should the owner request any alteration, deviations, additions or omissions from the said contract, he shall be at liberty to do so, and the same will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation." *Held*, that a recovery for such extra work on proof of reasonable value, should be upheld under said clause of the contract. *Dema-rest v. Haide*, 398.

16. Where it appears that the builder has substantially fulfilled his contract, though he has unintentionally been guilty of certain slight defects in performance, and that he has acted in good faith and to the best of his ability in carrying out the contract, the refusal of the architect

- to give a certificate of performance is unreasonable, and the builder may recover his compensation without it. *Ib.*
17. Where the contract makes the following reference: "Agreeably to the specifications made by G. W. C., architect, and signed by the said parties and hereto annexed," and no specifications were signed or annexed, what the parties intended should be the specifications, is a subject of oral proof. Hence, the question: "State what oral alterations were made in the specification Exhibit No. 2 before the signing of the contract," is not objectionable on the ground that the specifications in contract are in writing, and all prior oral agreements are merged therein. *Ib.*
18. Where it appears that the extra work,—*e. g.*, laying a concrete floor,—was done as requested by the defendant, it is not error to refuse to permit him to show that he protested against the work as insufficient during its progress. *Ib.*
19. Where the subject of the contract is plainly described in the agreement signed by the parties, the agreement is of itself the best evidence of meeting of minds and assent, and, in the absence of fraud or mutual mistake, is conclusive. *Lister v. Windmuller*, 407.
20. Where the mistake is that of one party alone, the rule of law is that whatever his real intention may be, if he manifests an intention to another party so as to induce that other party to act on it in making a contract, he will be estopped from denying that the intention as manifested was his real intention, and cannot avoid the contract on the ground of mistake. *Ib.*
21. Plaintiff had three separate contracts with defendant for doing work and furnishing materials; on one he was to receive the cost of the labor and materials, and ten per cent. thereon; on the other two he was to receive a specific sum. To sustain his claim on the first contract, he proved in a certain manner the value of the work and materials; he also proved that the stipulated compensations in the other contracts would not give him ten per cent. on either of them; he then testified that the whole bill for everything done under all the contracts, did not net him a greater profit than ten per cent. *Held*, insufficient to establish what the cost of the work and materials, under the first contract was, or what that cost, with ten per cent. added, would amount to, and not warranting a recovery on that contract. *Pitt v. Downing*, 508.
22. The plaintiff contracted to put in a house a steam heating apparatus, which should properly heat it. Defendant claimed that the apparatus, as put in, did not properly heat the house. The testimony admitted of the construction that the failure so to heat was due to the size, kind and situation of the boiler, as to which plaintiff followed defendant's directions. *Held*, that upon the finding of said facts, a finding that plaintiff had performed his agreement was justified. *Ib.*
23. The not offering to return, using when such use is contemplated by the contract, to test whether the thing furnished comports with the contract, and the calling on the party furnishing to remedy defects, will not give an action on the contract if it has not been complied with; but may be used as evidence, in connection with all other pertinent facts bearing on the questions of waiver, or acceptance, or of performance. *Ib.*
- Bill of lading, the contract with carrier; effect of clause limiting liability for loss by fire to cases of fraud or gross negligence; law of foreign state where bill of lading*

- was issued, applied. See *Platt v. Richmond, &c. R. R. Co.*, 493.
- Reformation of contract on ground of fraud or mistake; false declaration as to its legal purport. Damages for breach recoverable in action to reform contract.* See *Monne v. Ayer*, 139.
- Specific performance of contract, when not decreed.* See *Wilbur v. Gold & Stock Tel. Co.*, 189.
- Measure of damages in case of substantial, though not strict performance of building contract.* See *Morton v. Harrison*, 305.
- Authority to make a contract does not carry power to cancel the same, or receive notice of cancellation; policy of insurance construed as to broker's authority.* See *Von Wein v. Scottish Ins. Co.*, 490.
- Contract for purchase and sale of real property, what insufficient to establish.* See *Wright v. Mischo*, 241.
- Disaffirmance of contract to purchase real estate, and recovery of deposit made on account of price, &c.* See *Meth. Epis. &c. Church Home v. Thompson*, 321.
- Evidence that party executing sealed contract in his own name, when inadmissible; specific performance of contract to convey good title, when not decreed; construction of contract for purchase and sale of real estate.* See *Willis v. Bellamy*, 373.
- Stipulation having force of contract, when not to be set aside.* See *Keogh v. Main*, 160.

See SALE.

CONVERSION.

1. Where a bill of lading is delivered as collateral security, by the consignor to the discounters of a draft on the consignee, and the consignee refuses to accept the draft or the goods, or to pay the duties or freight, the holder of the draft, and of the bill of lading as collateral, has no absolute legal right to the possession of the goods. The collector of the

port, the goods not being entered in the custom-house, but remaining in his custody, subject to the duties, charges and carrier's lien for freight, and he having no notice of any claim by the holder of the draft and bill of lading, is justified in regarding himself as bailee of the carriers, and as holding the goods as their agent and in their behalf, and subject to their lien for unpaid freight. The collector's permitting, upon the carriers filing bills of lading of the goods, together with the other papers required by the custom-house regulations, the goods to be withdrawn from the custom-house and re-shipped to the place whence they came, without any notice of any claim on the part of a holder of a draft with a bill of lading as collateral, will not render him liable to such a holder, as for a conversion of the goods. *Am. Exchange v. Robertson*, 44.

2. The principle that where the negligence or laches of the true owner causes, or seems to justify one, whose possession was not tortious in the beginning, but rightful, in dealing with the goods as his own, an action for conversion will not be sustained, applied to the above case. *Ib.*
3. One charged with a tort in the conversion of property, cannot interplead a party making the charge with others claiming adversely to him, under whom the party charged acted. *Am. Tel. Co. v. Day*, 128.

Complaint for conversion, when insufficient. See *Douglas v. Winslow*, 489.

Cause of action for wrongful detention cannot be sustained under complaint for wrongful taking. See *Hopkins v. Davidson*, 529.

CORPORATIONS.

1. When an action is brought against the transferrer and transferee of stock in a corporation,

- and also the corporation, to have the transfer adjudged void, and to have the corporation deliver to the plaintiff its certificate for a like amount of stock, and the transferee is not brought into court, so that the judgment in the action will be inoperative as against him, the court has no authority to render a judgment against the corporation, adjudging it to issue to the plaintiff a new certificate, while the other remains outstanding. *Hyatt v. Swivel*, 1.
2. In case of judgment in action above indicated, entered *ex parte* on default of corporation defendant, adjudging it to issue a certificate to plaintiff, it is the power and duty of the court, on motion of such defendant, it being shown that the transferee had not been brought into court, to vacate it; and an order at special term, denying such motion, is appealable to the general term. *Ib.*
 3. The power to sell and convey, given by § 2, chapter 611 of the laws of 1875, to corporations organized under it, does not include a power to lease, therefore—as by § 3, 1 *R. S.*, ch. 18, title 3, no corporation can possess or exercise any corporate power, except such as shall be necessary to the powers granted—the making of a lease, by such a corporation, of all its property, unless it be by reason of imperative necessity, is *ultra vires*, and the lease is void. In such a case, it rests on the corporation to show the imperative necessity. *Metz. Concert Co. v. Abbey*, 97.
 4. In the case at bar, plaintiff corporation being the lessee of certain premises, made a sub-lease to defendant. *Held*, that in absence of proof by plaintiff that the premises could not be disposed of except by way of lease, the sub-lease was void. *Held further*, the business of plaintiff being to give musical entertainments, and the sub-lease being of the only property it possessed, and it not having given any musical entertainments, or performed any legitimate corporate act for some years, that evidence as to reasons for ceasing to give entertainments was immaterial and irrelevant. *Ib.*
 5. The worthlessness of stock is proved by a decree of sequestration of the property of the company, and when so proved, opinions of witnesses on the subject are inadmissible. *Tockerson v. Chapin*, 16.
 6. The plaintiff accepted the surrender of certain certificates of its stock, and issued new ones upon alleged forged powers of attorney, and the owner of the surrendered certificates brought an action against it, praying that the surrendered certificates, or others of the same form and tenor, be delivered to him, and all dividends earned be paid to him, and that he be adjudged the owner of the shares represented by the surrendered certificates, and that the company be adjudged to recognize him as such owner; thereupon, the plaintiff commenced an action against him, and the persons who procured, and those who then held certificates for the stock which had been before represented by the surrendered certificates, praying, among other things, for an injunction against such owner prosecuting his action, and against the other defendants commencing any action against it, based upon claims of ownership of the stock which had been represented by the surrendered certificates, or of dividends declared thereon. An injunction order in conformity with this prayer was granted. *Held*, that plaintiff was not entitled to the injunction. *Am. Telegraph Co. v. Day*, 128.
 7. A complaint in an action against a foreign corporation, upon contract, which does not show when

- the contract was made, executed or delivered, nor when nor how the summons was served, is not demurrable for want of jurisdiction, either of the person or the subject matter. *Fisher v. Charter Oak Life Ins. Co.*, 179.
8. The courts of this state will not interfere with the internal administration of the affairs of a foreign corporation, its officers, books and assets not being within their jurisdiction. Therefore, there is no cause of action in this state against such corporation to compel it to perform its agreement to make apportionment of moneys to be received by it. *Ib.*
9. Query, whether a complaint alleging facts claimed to constitute such a cause of action against such foreign corporation, and praying for the equitable relief that it make apportionment, is demurrable as showing want of jurisdiction of the subject matter? *Ib.*
10. An owner of stock of a company, from whom the certificate thereof has been taken wrongfully and without his knowledge, and delivered to a third party, cannot unite a cause of action or claim against said third party with a cause of action in a claim against the company, unless the obligation of the complaint show that the several claims are parts of a single claim or cause of action. *Day v. Bank State N. Y.*, 363.
- Application to corporations of rule exempting master for liability to employee for acts of co-employee.* See *Kenny v. Cunard S. S. Co.*, 434.

See MUNICIPAL CORPORATIONS.

COSTS.

1. In an action to open and set aside an account stated, and for an accounting as to the whole period of the business dealings of the parties, where plaintiff fails in setting aside the account, but

is found entitled to an accounting as to transactions subsequent thereto, and judgment for a certain sum, and it does not appear that before the trial, defendants offered to allow judgment to be taken for that amount, in the exercise of a sound discretion, costs should be awarded to plaintiff. *Rutty v. Person*, 329.

2. In an action against the city to recover an award to unknown owners, payment to the chamberlain, pleaded as a defense, does not, in any way, affect the question of costs upon a recovery by plaintiff. Its only effect is to stop interest on the award from the date of the payment to the chamberlain. *Bradhurst v. Mayor*, 51.

Terms imposed on vacating judgment, &c. See *Born v. Schrenkisen*, 213.

COURTS.

Power of judges of the court of common pleas to grant an injunction in an action in the superior court. court of common pleas not a county Court. See *People ex rel. Roosevelt v. Edson*, 53.

Jurisdiction of superior court presumed; foreign corporations, jurisdiction over. See *Fisher v. Charter Oak Life Ins. Co.*, 179.

CREDITOR'S ACTION.

When lien of creditor's action attaches on service of summons. See *Albert v. Back*, 550.

DAMAGES.

1. In case of a substantial but not strict performance of the contract, the measure of damages is the difference between the value of the house, as in fact finished, and as it would have been if the provisions of the contract had been strictly complied with. Evidence of cost to make conformity is immaterial and irrelevant to the inquiry as to this difference, in a case where it is manifest that to make such conformity would

- involve the destruction of so much work already done, and the doing of so much not originally contemplated by the parties as not to give the jury any reliable aid in ascertaining such difference. *Morton v. Harrison*, 805.
2. Damages for breach of instrument when reformed may be sued for and recovered in the action for reformation. *Monne v. Ayer*, 139.
 3. Where it is sought to prove damages for loss of business, evidence of particular facts, where there is no effort to make the testimony the ground of any claim for damages for specific loss therefrom, is admissible to show the general character of the business lost. *MacLennan v. L. I. R. R. Co.*, 22.
 4. The plaintiff, being a physician, may be asked whether, from his experience as a physician, there is any probability of his suffering thereafter, from a particular one of the injuries received, damages which are claimed in the action. An answer: "No probability, only a possibility," is favorable to the defendant. *Ib.*
 5. In case of a public nuisance, it is sufficient to enable an individual to maintain an action for an injunction, that he has suffered, or will suffer therefrom, substantial damage that is special and peculiar to him, as distinguished from the damage which he has suffered or will suffer, as one of the community. The nature or extent of the damage is immaterial, as the injunction does not depend on them. *42d St., &c. R. R. Co. v. 34th St. R. R. Co.*, 252.
 6. The measure of damages for landlord's failure to deliver possession of premises, is the difference between the yearly value of the premises and the amount of rent agreed upon. *Fondevila v. Jourgensen*, 408.
Damages for injury to horses. See Smith v. Cons. Ice Co., 430.

Elevated railways—total damage for taking easement recoverable—loss of rent and total damage cannot both be recovered.—Noise, smoke, ashes, dust, cinders, steam, gas, vibration, damages recoverable for injuries by. See Ireland v. Metr. El. Ry. Co., 450.

Measure of damages against the vendor for breach of contract of sale of personal property, the vendor in fact having no title to the property sold, but making the sale innocently, is difference between the contract price and the value at the time of breach. See Lister v. Windmuller, 407.

Continuous obstruction of sidewalk a public nuisance and but slight evidence of special damage necessary to sustain injunction at suit of private citizen. See Callanan v. Gilman, 112; *Lavery v. Hannigan*, 463.

Breach of contract by architect in failing to build house as agreed—measure of damages—loss of tenant. See Lord v. Comstock, 548.

DEFENSES.

See ACTION PENDING; EQUITY, 12; RES ADJUDICATA.

DEMURRER.

See PLEADING.

DIVORCE.

Provisions of general rule 74 as to examination of plaintiff concerning matters therein set forth. See Burgess v. Burgess, 545.

EASEMENT.

Damage to easement by elevated railway; to what extent recoverable; how ascertained. See Ireland v. Metr. El. Ry. Co., 450.

EJECTMENT.

Where a complaint in an action of ejectment does not set forth that defendant unlawfully withholds, or that he entered without the consent of the plaintiff, or in any wise wrongfully, or that plaintiff

is entitled to the immediate possession of the premises, and does not contain any equivalent allegation, it will be held bad on demurrer. It will not be presumed that defendant, in such case, is a wrongdoer. The presumption is that one in possession is lawfully in possession. *Moore v. Lehman*, 283.

ELEVATED RAILWAYS.

See RAILROADS.

EQUITY.

1. Multiplicity of actions will not, of itself, constitute an equity on which to found an equitable action. The anticipated issues between the plaintiff in the equity action, and the various defendants thereto must be *ad idem*. *Am. Tel. Co. v. Day*, 128.
2. A false declaration of the legal purport and effect of an instrument is a sufficient ground for its reformation,—*e. g.*, a lessor, on his attention being called, by the lessee, to the omission, from a proposed written lease, of sundry provisions which formed part of the oral agreement, in execution of which the written lease was to be made, represented that it was a matter of no importance, because the provisions had been previously agreed on and such previous agreement would not be affected by the execution of the lease; believing and relying on which statement, the lessee executed the lease. *Held*, a proper case for reformation. There was either a mutual mistake, or mistake on one side and fraud on the other. *Monne v. Ayer*, 139.
3. Damages for breach of instrument when reformed may be sued for and recovered in the action for reformation. *Ib.*
4. In an action for specific performance of a contract,—*e. g.*, to furnish certain telegraphic information,—where it appears that the defendant is unable to specifically perform, the usual practice is to withhold the relief prayed for. *Wilbur v. Gold & Stock Tel. Co.*, 189.
5. Where the alleged inability to perform arises after the beginning of the action, the defendant should be allowed to plead the facts tending to show such inability, by supplemental answer. *Ib.*
6. An account which has been settled and stated, will be opened in equity only on clear proof that the settlement was induced by fraud, mistake or manifest error, and never where it appears that at the time of the settlement, both parties had full knowledge of the facts in relation to the charges, and, after mutual concessions, agreed that the account should be a stated account. *Rutty v. Person*, 329.
7. In an action to open and set aside an account stated, and for an accounting as to the whole period of the business dealings of the parties, where plaintiff fails in setting aside the account, but is found entitled to an accounting as to transactions subsequent thereto, and judgment for a certain sum, and it does not appear that before the trial, defendants offered to allow judgment to be taken for that amount, in the exercise of a sound discretion, costs should be awarded to plaintiff. *Ib.*
8. Courts of equity apply the rule as to payment into court according to the equities of each case. *Wood v. Rabe*, 479.
9. In the case at bar, plaintiff was entitled, upon payment to one Maria Mulock of certain sums, to a re-conveyance of certain real estate, the legal title to which was, on February 23, 1860, and at the time of the commencement of the action, in said Maria Mulock, and of which she was in possession. On October 23, 1860, plaintiff tendered said sums, with interest to that date, to said Maria Mulock, and demanded a deed,

which she refused to give. The complaint in the action, among other things, alleged a certain tender and refusal to give the deed, and contains an offer to pay the sums tendered, and prayed for a re-conveyance. The answer denied the tender alleged. Pending the action, Mrs. Mulock died, and it was revived against the defendants, the executors of her will, and her children. The court below rendered judgment decreeing the execution and delivery of a deed to the plaintiff, and that, at the time of such delivery, plaintiff pay to her executors the said certain sums, with interest thereon to October 23, 1860. *Held*, a proper judgment; that under the circumstances of the case, the actual payment into court was not necessary to work a stoppage of interest on October 23, 1860. *Also held*, that by taking issue on the tender, payment into court was waived. *Ib.*

10. An equitable action by an assignee for the benefit of creditors, to restrain the sheriff and judgment creditor from taking any proceedings under a judgment obtained in another court, and the execution issued thereon, and to set aside the levy thereunder, will not lie. *Chittenden v. Davidson*, 421.
11. One whose own property is eventually liable for a claim, to the payment of which other property is applicable in the first instance, will not be subrogated in the place of the party who held such claim, and to whom the same had been paid out of the property of the party seeking a subrogation, as to the rights which, before such payment, he had to require satisfaction of such claim out of the property which in the first instance was applicable thereto. *Smith v. Cornell*, 490.
12. Thus, two parcels of land were delivered to an executor, on a valid trust to receive and pay rents during certain lives, and the

remainder in fee descended to the heir at law; at the testator's death, certain taxes were due and unpaid. Pursuant to a judgment of foreclosure and sale made June 11, 1883, as to one parcel, and a judgment of sale in an action for dower made September 20, 1883, as to the other, these taxes were paid out of the proceeds of sale (the executor not having previously paid them out of the personalty) and the surplus funds were paid to the executor as trustee. The testator died January 24, 1883, leaving sufficient personalty wherewith to pay these taxes, which were preferred debts. Letters testamentary were issued February 12, 1883. The heir at law commenced the action February, 1885, praying to be subrogated in the place of the authorities to whom such taxes were paid, as to the amount thereof, and that defendants pay the amount thereof, with interest, to her. Defendant, by his answer, set up that he had received all the known assets or personal property of the testator, and that the admitted unpreferred claims against the estate were largely in excess of the assets received by him, including such surplus funds. Plaintiff demurred to the answer, as insufficient in the law. *Held*, that the answer presented a good defense. *Ib.*

13. The power of a court of equity to control the acts of an executive officer is limited to such acts and duties as are merely ministerial, and involve no exercise of discretion (by *INGRAHAM, J.*). *People ex rel. Roosevelt v. Edison*, 58.
14. In case of an agreement to apportion and pay the amount apportioned, apportionment is necessary before an action will lie for a money judgment. Therefore a demurrer to a complaint in an action brought on such an agreement before apportionment, demanding a money judgment, is

well taken. But upon proper proof an action will lie to compel the making of an apportionment. *Fisher v. Charter Oak Life Ins. Co.*, 179.

When judgment vacated after affirmance at general term, and amendment of answer allowed, on equitable considerations; terms on. See *Born v. Schrenkeisen*, 319.

Specific performance of contract to give good title, when not decreed. See *Willis v. Bellamy*, 873.

Action to have bond and mortgage declared canceled under bequest in will. See *Weeks v. Ostrander*, 512.

See INTERPLEADER.

ESTOPPEL

Where the mistake is that of one party alone, the rule of law is that whatever his real intention may be, if he manifests an intention to another party, so as to induce that other party to act on it on making a contract, he will be estopped from denying that the intention as manifested was his real intention, and cannot avoid the contract on the ground of mistake. *Lister v. Windmuller*, 407.

EVIDENCE

1. A certificate as to the official character and genuineness of signature of the officer taking an affidavit in another state, is insufficient to entitle the affidavit to be received as legal evidence of the facts therein stated, if it does not certify both that the officer was duly authorized to take affidavits in that state, and that the certifying officer is well acquainted with the handwriting of the officer taking the affidavit and believes the signature to the verification to be genuine. An affidavit of service of summons taken in another state, having attached to it such defective certificate of proof, is no proof of service. *Hyatt v. Swivel*, 1.

2. The worthlessness of stock is proved by a decree of sequestration of the property of the company, and when so proved, opinions of witnesses on the subject are inadmissible. *Tockerson v. Chapin*, 16.

3. Where, to prove a cause of action or a defense, it is necessary to show that a witness acted upon a certain supposition, evidence to that effect is material and relevant, and he is a competent witness to testify that he so acted; but it must also be shown by the evidence that the appearance justified the witness in having the supposition, and that the party against whom he testified was responsible for that appearance. *MacLennan v. L. I. R. R. Co.*, 22.

4. Where it is sought to prove damages for loss of business, evidence of particular facts, where there is no effort to make the testimony the ground of any claim for damages for specific loss therefrom, is admissible to show the general character of the business lost. *Id.*

5. The plaintiff, being a physician, may be asked whether, from his experience as a physician, there is any probability of his suffering thereafter, from a particular one of the injuries received, damages which are claimed in the action. An answer: "No probability, only a possibility," is favorable to the defendant.

6. In an action for damages from the falling of a building so constructed, &c., as to constitute a nuisance, a witness testified to finding in the plaintiff's back yard some mortar, which he produced; that it was picked up right by the side of the wall of the building which was on the lot of the defendant Fenton, which wall extended beyond plaintiff's rear wall; that he found brick and said mortar lying there; that it appeared as if a portion of the wall above had fallen. *Held*,

- competent, as the jury might find from it that the mortar came from the wall which fell, and the question of the constituents of the mortar being material. *Jarvis v. Baxter*, 109.
7. Where a witness, on his cross-examination, denies having made a statement as to a fact or circumstance, which is or may be argued to the jury to be within his knowledge, and which is inconsistent with matters material to the issue to which he has testified on the direct examination, the time when, place where, and person to whom such statement was made, being seasonably called to the attention of the witness, it may be proved, in contradiction, as affecting his credibility, that he did make the statement. *Kinner v. Del. & Hud. Canal Co.*, 162.
 8. Declarations made by a party at the initiation of an act continuous in its nature, as to his intent with respect to the mode in which he purposes to do the act, are competent evidence to prove that he did it according to his expressed intention, provided the continuity of the act has not been interrupted for a space of time, during which things may have happened to cause a change in the original intention. But a declaration which, for aught that appears, refers to a past transaction, is inadmissible. *Nowell v. Mayor*, 382.
 9. Shortly before the injury, the deceased was in One Hundred and First street, and he was found in the center of that street at the foot of a wall twenty-five feet high, which abruptly changed the grade of the street, with a broken leg, and other great hurts.—*Held*, sufficient to carry the case to the jury on the question as to whether he received the injuries by falling over the wall. *Ib.*
 10. Error in exclusion of evidence is cured by the subsequent admission of evidence on the same point offered by the party against whom the error was committed. *Lister v. Windmuller*, 407.
 11. In an action against a common carrier for loss of goods, where the bills of lading are put in evidence by plaintiff generally, and without limitation, it cannot be claimed on appeal that they do not constitute the contract between the parties. *Platt v. Richmond, &c. R. R. Co.*, 456.
 12. Where the bill of lading contains a clause exempting the carrier from loss or damage by fire, unless such fire be proved to have occurred from the fraud or gross negligence of defendant or his agents, the burden is on plaintiff seeking to recover for such loss, to show that the fire occurred from the causes enumerated. *Ib.*
 13. A receipt may be explained as to the consideration part, when the explanation is not inconsistent with the instrument; but so far as it is a contract having a settlement or release for its object, it cannot be varied or explained verbally—and this, whether the paper be sealed or not. *Randall v. Reynolds*, 145.
 14. Where the contract makes the following reference: "Agreeably to the specifications made by G. W. C., architect, and signed by the said parties and hereto annexed," and no specifications were signed or annexed, what the parties intended should be the specifications is a subject of oral proof. Hence, the question: "State what oral alterations were made in the specification Exhibit No. 2 before the signing of the contract," is not objectionable on the ground that the specifications in contract are in writing, and all prior oral agreements are merged therein. *Demarest v. Haide*, 398.
 15. Where it appears that the extra work,—*e. g.*, laying a concrete floor,—was done as requested by

- the defendant, it is not error to refuse to permit him to show that he protested against the work as insufficient during its progress. *Ib.*
16. Where the subject of the contract is plainly described in the agreement signed by the parties, the agreement is of itself the best evidence of meeting of minds and assent, and, in the absence of fraud or mutual mistake, is conclusive. *Lister v. Windmuller*, 407.
17. Plaintiff had three separate contracts with defendant for doing work and furnishing materials; on the one he was to receive the cost of the labor and materials, and ten per cent. thereon; on the other two he was to receive a specific sum. To sustain his claim on the first contract, he proved in a certain manner the value of the work and materials; he also proved that the stipulated compensations in other contracts would not give him ten per cent. on either of them; he then testified that the whole bill for everything done under all the contracts, did not net him a greater profit than ten per cent. *Held*, insufficient to establish what the cost of the work and material under the first contract was, or what that cost, with ten per cent. added, would amount to, and not warranting a recovery on that contract. *Pitt v. Downing*, 508.
18. The plaintiff contracted to put in a house a steam heating apparatus, which should properly heat it. Defendant claimed that the apparatus, as put in, did not properly heat the house. The testimony admitted of the construction that the failure so to heat was due to the size, kind and situation of the boiler, as to which plaintiff followed defendant's directions. *Held*, that upon the finding of said facts, a finding that plaintiff had performed his agreement, was justified. *Ib.*
19. The not offering to return, using when such use is contemplated by the contract, to test whether the thing furnished comports with the contract, and the calling on the party furnishing to remedy defects, will not give an action on the contract if it has not been complied with, but may be used as evidence, in connection with all other pertinent facts bearing on the questions of waiver, or acceptance, or of performance. *Ib.*
20. In case of a substantial but not strict performance of the contract, the measure of damages is the difference between the value of the house, as in fact finished, and as it would have been if the provisions of the contract had been strictly complied with, and evidence of cost to make conformity is immaterial and irrelevant to the inquiry as to this difference, in a case where it is manifest that to make such conformity would involve the destruction of so much work already done, and the doing of so much not originally contemplated by the parties as not to give the jury any reliable aid in ascertaining such difference. *Morton v. Harrison*, 305.
- Requisites of proof of false representations to support action thereon.* See *Tockerson v. Chapin*, 16.
- Where the case turns on the point of time, as regards certain alleged false representations, when certain moneys were received by defendants, evidence merely that the representations were made and the moneys received on the same day, is insufficient.* See *Richards v. Fox*, 36.
- False representations, evidence insufficient to sustain action for.* See *Catlin v. Viator*, 169.
- Creditor's bill, what insufficient evidence of insolvency; evidence of*

- previous intention to make alleged fraudulent transfer, when admissible.* See *Colby v. Peabody*, 394.
- Policy marine insurance, what not sufficient evidence of ownership in action on.* See *Petrel (Guano Co. v. Providence, &c. Ins. Co.)*, 297.
- Evidence sufficient to support a defense of settlement of claim for damages for failure of landlord to deliver premises as agreed; oral agreement merged in written lease.* See *Fondevila v. Jourgensen*, 403.
- Evidence to the effect that one not executing sealed contract as to real estate is the real party to the contract, inadmissible in an action based on the contract.* See *Willis v. Bellamy*, 373.
- Evidences inadmissible under § 829, Code.* See *Curtiss v. Moore*, 532.

EXAMINATION OF PARTY.

- Examination of plaintiff in negligence case, by physician, on trial refused.* See *Archer v. 6th Ave. R. R. Co.*, 378.

EXECUTION.

1. An execution against the body can issue against defendant upon a judgment obtained against him, in an action for personal injuries caused by his negligence, though no order of arrest has been obtained. *Ritterman v. Ropes*, 236.
2. The sheriff, ninety days after an execution was issued by him, made the following return: "In pursuance of the demand of plaintiff's attorney, I make the following return to the within execution: I have collected nothing under, and have not found any personal property out of which the said execution, or any part of the same can be made, but I have thereunder levied upon the real estate mentioned in the annexed notice of sale, and have advertised the same for sale as in said notice provided. I have found no other property out of which to satisfy the same."

- Held*, that the execution was returned unsatisfied within the meaning of section 2435 Code, and that plaintiff was entitled thereunder to an order for defendant's examination in supplementary proceedings. *Forbes v. Spaulding*, 166.
3. The effect of such a return is not modified by the statement of the sheriff, that it was made at request of plaintiff's attorney. *Id.*
 4. The proceeding to give notice of sale of real estate in execution of the statutory power for sale of real estate under a judgment, is not a satisfaction, because the real property remains in the debtor and in his possession. *Id.*
- Where injunction not granted on application of assignee for benefit creditors to restrain proceedings under execution and set aside levy.* See *Chittenden v. Davidson*, 421.
- When assignment held good as against levy under execution assignment being made and delivered prior, though not recorded till subsequent thereto.* See *Pancoast v. Spowers*, 523.
- Broker—when action against, not deemed to depend on allegations of fiduciary relations.—Body execution in action against broker, &c.—when set aside.—Arrest—when grounds of extrinsic to cause of action.* See *Graeffe v. Currie*, 554.
- #### EXECUTORS AND ADMINISTRATORS.
- One of two claimants to a legacy is not represented therein by the executor of the estate against whom an action is brought by the other claimant.* See *Weeks v. Ostrander*, 512.
- See *Equity*, 12.
- #### FACTOR.
1. A factor has no right to sell for advances until the principal fails to pay after reasonable notice. *Casson v. Field*, 196.
 2. A factor who has sold goods of

his principal, guaranteed the sale, and made advances thereon, has a cause of action against the vendee, which he may sell and assign. *Comm. Bank v. Heilbronner*, 388.

See ACTION PENDING.

FALSE REPRESENTATIONS

See FRAUD.

FRAUD.

1. In an action for damages for false representations on a sale, the representations must relate to some substantial circumstance going to the inducement or essence of the bargain, material to the subject of the negotiation, and constituting the very basis of the contract. They must also relate to facts (not to opinions) bearing on the subject of the contract—not to those collateral and incidental thereto. They must also have a vital bearing and influence on the mind of the party in inducing him to enter into the contract, and must be such as to affect the value of the thing purchased. *Tockerson v. Chapin*, 16.
2. In the case of a sale of shares of stock in a corporation, the plaintiff knew that the property of the company consisted of patent-rights of an invention for cutting goods, and that the plan of the company was to dispose of royalties, sell shop-rights and machines, and that it had no other source of profit. A prospectus given to plaintiff referred to a certain loom, which, it was stated, did not belong to the company, but could be purchased from the manufacturers, and would cost but little more than the ordinary one. The plaintiff was a machinist, and had made a personal examination of the machine for which the company owned the patent, and was satisfied with its performance. *Held*, that representations that the company had orders for five hundred looms, at \$150 each (there being no representation that any profit could accrue to the company therefrom); that five cutting machines at \$5,000 each had been ordered by certain named firms; and that a member of one of those firms was a large stockholder in the company; there being no evidence that their falsity, if they were false, injuriously affected the value of the stock, did not possess the above requisites, and no cause of action for damages could arise out of their falsity. *Id.*
3. The cause was tried, and turned in the court below, upon questions as to the point of time when defendants received from plaintiffs the sum of money sued for, which plaintiffs alleged defendants had obtained from them on the false representations that a similar one was due them from the United States government as and for a drawback, and that they would pay to plaintiffs the amount of the drawback, when the same should be paid to them by the United States,—and also upon the question as to when defendants received the drawback from the United States. The evidence showed that defendants made the representations, and received the money from plaintiffs, and also received the drawback on the same day; but failed to show which was received first. *Held*, that the complaint was properly dismissed. *Richards v. Fox*, 36.
4. Defendants' broker offered for sale to plaintiffs several notes, amounting to about \$7,000, owned by defendants, made by P. L. Freneau & Co., customers of theirs, and the broker stated as a reason for defendants' desire to sell, that they had a large amount of orders waiting for delivery to the makers of the notes, but they were unwilling to deliver until they parted with the

paper. Plaintiffs, not being satisfied with this, sent a clerk to defendants to obtain information. The clerk, without disclosing that he desired the information in regard to the plaintiffs having been offered notes belonging to the defendants, asked various questions, the answers to which were, in substance, that defendants had no information concerning P. L. Freneau & Co., other than what could be got from mercantile agencies; that they had no statement from them, but they sold them freely, and had several thousand dollars ready for delivery to them. This conversation was repeated to plaintiffs, and they bought the notes. One of the plaintiffs testified that he told the broker the next day that he did not like the statement of the makers of the notes, but thought they would pull through that season, as the defendants were going to deliver the goods, and the delivery would guarantee the payment of the notes. He also testified that the reason that actuated him was the fact that the defendants were going on to deliver their new goods through the season, beginning with this particular purchase, and if they delivered this bill of \$8,000 or \$10,000, they would probably deliver another one. *Held*, on appeal from a dismissal of the complaint, that as it was not proved either that defendants had not sold goods freely, considering the vague meaning of that term, or that they had not on hand ready for delivery a large amount, or several thousand dollars' worth of goods, and as they were not apprised of the expediency or duty of being exact, and as the statements as to those matters being the only ones which formed the basis of the reasons on which plaintiffs relied in purchasing the notes, as testified to by one of them, an action on the alleged false representations

would not lie. *Catlin v. Vietor*, 169.

5. In an action brought by a judgment creditor to set aside a transfer of a seat in the Stock Exchange, made by the debtor to his son, without valuable consideration, shortly after the beginning of the action in which the judgment was recovered, it appeared that at the time of the transfer, beside such seat, the debtor possessed an interest in stocks, viz.: a margin of the cash value of \$26,612; that the action in which the judgment was recovered was bought for \$73,000, but that by reason of a counterclaim of \$50,000 on contract, the recovery was only \$18,000. It also appeared that subsequently said margin was absorbed in the stock transaction referred to, leaving defendant without property. *Held*, that the defendant could not be held insolvent at the time of the transfer; that the question whether he was guilty of fraud in parting with the property with intent to deprive plaintiff of its benefit, was a question of fact for the court below; also, that defendant had the right to show that the transfer was not induced by plaintiff's action, by proving that it was the result of determination made theretofore. *Colby v. Peabody*, 394.

False statement of legal purport of lease made by lessor at time of execution, when ground for reformation thereof. See *Monne v. Ayre*, 189.

Account stated may be opened on ground of fraud. See *Rutty v. Person*, 329.

Transfer to hinder, &c., creditors.—Purchase upon sale under execution, necessity of actual change of possession to rebut presumption of fraud. &c., effect of payment of valuable consideration. See *Remington v. Fisher*, 527.

Fraudulent assignment—lien of creditor's bill to set aside—when at-

laches on service of summons only—when funds still deemed in possession of assignee though check has been drawn to creditor's order and delivered to attorney for assignee, who has also received from creditor evidences of claim. See *Albert v. Back*, 550.

When allegations of fiduciary relations not essential to cause of action.—Body execution set aside. See *Graeffe v. Currie*, 554.

See AGENCY.

INJUNCTION.

1. An injunction can only be granted *ex parte*, by the court in which the action is brought, or a judge thereof, or a county judge. The provisions of section 606 of the Code of Civil Procedure alone apply; those of sections 277 and 772 do not. *People ex rel. Roosevelt v. Edson*, 53.
2. The court of common pleas of the city and county of New York is not a county court, and the judges thereof are not county judges. Consequently *held*, an *ex parte* injunction order made in an action pending in this court by a judge of the court of common pleas of the city and county of New York, is without jurisdiction and void. *Ib.*
- A violation of a void injunction order is not punishable as contempt. *Ib.*
3. The power of a court of equity to control the acts of an executive officer is limited to such acts and duties as are merely ministerial, and involve no exercise of discretion (by *INGRAHAM, J.*). *Ib.*
5. The power of the mayor of the city of New York to appoint a commissioner of public works and a counsel to the corporation, is an executive power of the state vested in him by the constitution and laws, and involves the exercise of discretion. An *ex parte* injunction restraining him from exercising, or controlling him in the exercise of such powers of appointment is therefore void; and his disregard of it is not a contempt (by *INGRAHAM, J.*). *Ib.*
6. Chapter 531, laws 1881, has no application to such a case, the action of the mayor not being an act on behalf of a county, town, village or municipal corporation (by *INGRAHAM, J.*). *Ib.*
7. *People v. Dwyer* (90 N. Y. 492); *People v. Sturtevant* (9 *Ib.* 263), distinguished (by *INGRAHAM, J.*). *Ib.*
8. The corporation plaintiff accepted the surrender of certain certificates of its stock, and issued new ones upon alleged forged powers of attorney, and the owner of the surrendered certificates brought an action against it, praying that the surrendered certificates or others of the same form and tenor be delivered to him, and all dividends earned be paid to him, and that he be adjudged the owner of the shares represented by the surrendered certificates, and that the company be adjudged to recognize him as such owner; thereupon, the plaintiff commenced an action against him, and the persons who procured, and those who then held certificates for the stock which had been before represented by the surrendered certificates, praying, among other things, for an injunction against such owner prosecuting his action, and against the other defendants commencing any action against it based upon claims of ownership of the stock which had been represented by the surrendered certificates, or of dividends declared thereon. An injunction order in conformity with this prayer was granted. *Held*, that plaintiff was not entitled to the conjunction. *Am. Tel. Co. v. Day*, 128.
9. The fact that one is about to commit an act which would cause a public nuisance, gives the court

jurisdiction to restrain it. *Forty-second St., &c. R. R. v. Thirty-fourth St. R. R. Co.*, 252.

10. In such case,—i. e., public nuisance,—it is sufficient to enable an individual to maintain an action for an injunction, that he has suffered, or will suffer therefrom, substantial damage that is special and peculiar to him, as distinguished from the damage which he has suffered or will suffer, as one of the community. The nature or extent of the damage is immaterial, as the injunction does not depend on them. *Ib.*

11. An equitable action by an assignee for the benefit of creditors, to restrain the sheriff and judgment creditor from taking any proceedings under a judgment obtained in another court and the execution issued thereon, and to set aside the levy thereunder, will not lie. *Chittenden v. Davidson*, 421.

Sidewalk—obstruction of substantially continuous—public nuisance.—Special damage—slight evidence of will sustain injunction against, at suit of private citizen—When such injunction not too broad. See Callanan v. Gilman, 112.

Abutting owners on streets opened prior to conquest of New Netherlands, not entitled to enjoin operation, &c., elevated railways. See Abendroth v. Manh. R'y Co., 274.

Nuisance—injunction by private party against—Special damage—what sufficient proof of. See Lavery v. Hannigan, 463.

INSOLVENCY.

What insufficient evidence of insolvency to sustain creditor's bill founded on fraudulent transfer. See Colby v. Peabody, 394.

INSURANCE.

(FIRE.)

1. Where the terms of the policy of insurance provide that it may be canceled at any time by the com-

pany, on giving notice to that effect, such notice must be given to the insured in person, or to some one authorized by him to act as his agent to receive such notice. *Von Wein v. Scottish, &c. Ins. Co.*, 490.

2. A broker employed to procure insurance has no authority to accept or give a notice of cancellation of the policy. When he procures the insurance, his agency ends. *Ib.*

3. Although the policy provides that the broker procuring the insurance shall be deemed to be the agent of the insured in any transaction relating to the insurance, this condition applies only to matters occurring before the issuing of the policy. *Ib.*

4. The delivery of the policy to the insured without requiring the payment of the premium, raises a presumption that a credit was intended, and the policy is valid. *Ib.*

5. Where a credit has been given as above, it is not necessary for the company to return or tender the *pro rata* unearned premiums, as provided in the policy, to constitute a valid cancellation thereof, the company never having received the premium. *Ib.*

(LIFE.)

Under an insurance policy upon the life of one Frederick Wuesthoff, payable on the death of his wife Amalia, before him, to "her children" (the plaintiffs herein), or to their guardian if under age, payment to be made in sixty days after due notice and proof of the death of said Frederick, Eliza Fredericka, the second wife of said Frederick, served on defendant a notice and proof of death, signing them "as guardian of the children of the deceased Amalia," and claiming the ownership of the policy as such guardian, and thereupon defendant paid to her the amount of the policy. No other notice and

proof of death was served. *Held*, in this action to recover the amount of the policy : (1) That if it was claimed by plaintiffs that the notice given was not given on behalf of them, then the notice intended by the policy had not been given, for the defendant was entitled to notice given by, or on behalf of, those entitled to receive payment ; and it not having been given on behalf of plaintiffs, they could not ratify. (2) That if the plaintiffs take advantage of the notice, thus affirming the exercise by Eliza Fredericka of authority over the policy as owner, the consequence, to wit, its payment to her, must also be affirmed. (3) That the complaint was therefore properly dismissed. *Wuenthoff v. Germania Life Ins. Co.*, 208.

(MARINE.)

In an action on a policy of marine insurance, the complaint alleged ownership of the property in question by the assured, which was denied by the answer. On the trial the only evidence in support of the allegation was the policy of insurance containing the following clause : "S. K. Schwenk" (the assured), "on account of whom it may concern, in case of loss, to be paid to him or order, does make insurance and cause himself to be insured, etc," and also written assignments thereof showing title thereto in plaintiff. *Held*, that the complaint was properly dismissed ; that the burden of proof was on plaintiff to establish an insurable interest, without which the policy was a mere wager. *Petrel Guano Co. v. Providence, &c. Ins. Co.*, 297.

INTEREST.

When actual payment into court not necessary to stop interest. See *Wood v. Rahe*, 479.
Award to unknown owners—payment to chamberlain after action com-

menced, pleaded as defense—effect on costs and interest. See *Bradhurst v. Mayor*, 51.

INTERPLEADER.

1. Where the perplexity and danger upon which the plaintiff founds his action of interpleader, or one in that nature, arises out of an act done voluntarily and advisedly by him, it does not arise without his fault, and the action will not lie. *Am. Telegraph Co. v. Day*, 128.
2. One charged with a tort in the conversion of property cannot interplead the party making the charge with others claiming adversely to him, under whom the party charged acted. *Ib.*
3. A motion or an order of interpleader, on ground of danger of being compelled to pay twice, will be denied, where, in the opinion of the court, there is no such danger as forms the foundation of a right to interplead. The above doctrine applied to a case where the sheriff, under attachment, and receivers of property of fraudulent assignors were the claimants. *Sulzbacher v. Natl. Shoe & Leather Co.*, 269.

JOINDER OF ACTIONS.

See PLEADING.

JUDGE'S CHARGE.

1. After the judge had concluded his charge to the jury, the defendant's counsel requested him to charge further : "If you find from the evidence that the plaintiffs' driver drove his horse close to the wheel of defendant's wagon, upon nice calculations of the chances of injury, then that in itself constitutes such negligence as would prevent the plaintiff's recovery, and entitle the defendant to a verdict," which was refused. *Held*, not error : that the true question under this head was, did the action of the plaintiff's

driver lead or contribute to the injury? and this without regard to his calculations, or how nice they were; and the subject having been exhausted by the charge previously made, the instruction asked for could have answered no useful purpose. *Smith v. Consumers' Ice Co.*, 430.

2. The defendant's counsel also requested the judge to charge as follows: "If you are satisfied from the evidence that the injuries complained of were aggravated by the subsequent negligence of the plaintiff's driver in driving the horse after he was aware of the injury, this fact must be considered in mitigation of plaintiff's damages," which was refused. *Held*, not error. The injury to the horse by the passage of the wheels of the ice-cart over its foot, was the destruction of the "*os corona*," and was such that it was impossible for the horse to recover; therefore the question suggested by the request was immaterial. *Ib.*
3. An omission to take an exception to a charge as to a fact, is an admission that the fact is as charged. *Casson v. Field*, 196.

JUDGMENT.

1. The court has inherent power to vacate the judgment, even after affirmance thereof at general term, and permit an amendment of the answer, the exercise of which power is in its discretion. *Born v. Schrenkeisen*, 219.
2. In view of the matters stated in the moving papers, and considering that in all probability the parties did not in fact intend the contract to be as the court, upon unexplained proof found it to be, whereby the real merits were not tried, and that possibly the judgment, unless vacated, might be relied on by the plaintiff as a bar to an action for reformation, and as a conclusive adjudication as to the true construction of the con-

tract in all actions that might be brought from year to year during the life of the patent,—*held*, the discretion of the court below was properly exercised in vacating the judgment, and permitting an amendment of the answer. *Ib.*

3. The terms imposed in this case, viz: the payment of the costs of the action, including the allowance, and of \$10 costs of motion, and, it appearing the defendants had brought an action for reformation of the contract, in which a demurrer had been interposed, that such action be discontinued, and the costs thereof (to be taxed as if the demurrer had been sustained), be paid,—were proper, with the modification that the amendment should be restricted to setting up only the defense relating to the right of defendants to have the contract that was written reformed, so as to express the actual intention of the parties as to what it should contain, so as to prevent a re-trial of the old issues; and that, as thus modified, the order vacating judgment should be affirmed. *Ib.*
4. When an action is brought against the transferor and transferee of stock in a corporation, and also the corporation, to have the transfer adjudged void, and to have the corporation deliver to the plaintiff its certificate for a like amount of stock, and the transferee is not brought into court, so that the judgment in the action will be inoperative as against him, the court has no authority to render a judgment against the corporation adjudging it to issue to the plaintiff a new certificate, while the other remains outstanding. *Hyatt v. Swivel*, 1.
5. In case of judgment in action above indicated, entered *ex parte* on default of corporation defendant, adjudging it to issue a certificate to plaintiff, it is the power and duty of the court, on motion

of such defendant, it being shown that the transferee had not been brought into court, to vacate it; and an order at special term, denying such motion, is appealable to the general term. *Ib.*

6. The proceeding to give notice of sale of real estate in execution of the statutory power for sale of real estate under a judgment, is not a satisfaction, because the real property remains in the debtor and in his possession. *Forbes v. Spaulding*, 166.

See RES ADJUDICATA.

JURISDICTION.

Foreign corporations, jurisdiction of courts over. See *Fisher v. Charter Oak Life Ins. Co.*, 179.

JURY TRIAL.

See TRIAL.

LANDLORD AND TENANT

1. A tenant-at-will is entitled to at least reasonable notice to quit. A notice to leave forthwith is not sufficient, especially when accompanied with a notice to get his personal property together and remove it. *Newman v. Marshall*, 202.
2. Plaintiff (the tenant) sued defendant (the landlord), in action for damages for not delivering possession, and for breach of an agreement to put the premises in good order, alleged to have been made at the time of the execution of the written lease, but not embodied therein. The defense was a settlement of the claim. Defendant testified that negotiations were had as to the matters in difference; and that the terms of settlement were agreed on. On the day after, plaintiff sent defendant a receipt which had been prepared for him by a friend, for a certain sum of money in full for the rent for a

certain period; the sum mentioned in the receipt was less than that reserved by the lease, and was the amount found by a calculation made on the basis of the terms of settlement testified to by the defendant. The defendant added to the receipt the words, "In settlement of difference, the above amount is received," signed it and sent it to plaintiff. It did not appear that there was any difference between the parties, other than those thus existing, and which were the subject of the action. Payment was made according to the receipt. Plaintiff did not deny that negotiations were had, nor did he deny that an agreement for an allowance to him had been carried out, so far as it could then be done. Plaintiff denied that he knew of the addition to the receipt when he took it back, and in substance testified in general terms that he did not agree to settle his claim for damages. There was no evidence of the difference between the value of the premises, and the rent. *Held*, a direction of a verdict for defendant on the ground that the cause of action had been settled before suit was brought was correct. *Fondavila v. Jourgensen*, 403.

3. There being no evidence of any difference between the yearly value of the premises and the rent, no damages issuing out of a breach of the implied agreement to yield possession are shown. *Ib.*
4. The written lease, if there is one, is the only competent evidence of an agreement to put in order, and if the lease contain no such agreement, no damages can be recovered on such an alleged agreement. *Ib.*

What not sufficient abandonment of premises to justify landlord's technical assault in excluding tenant from re-entry. See *Newman v. Marshall*, 202.

LEASE.

When lease may be reformed on ground of mistake or fraud, though the false declaration be as to legal purport thereof. See Monne v. Ayer, 139.

Lease by corporation, when ultra vires and void. See Metr. Concert Co. v. Abbey, 97.

LEGACY.

See WILL.

LETTER OF CREDIT.

See CONTRACTS.

LIBEL AND SLANDER.

1. Prior to this action, an action of libel was brought against defendant Tousey, founded on a newspaper article, of and concerning the plaintiff therein (a woman), charging, among other things, that some one had been written to, to inquire if her children were illegitimate; and that he was instructed chiefly to ascertain if her character was decent; also "they" cast the stigma of bastardy on two innocent little children, and that she herself had become a certain man's mistress. Defendant Tousey, in his answer in that action, which was signed by defendant Spooner as his attorney, set up for a defense and in mitigation of damages, that the plaintiff therein was of bad character as to chastity, had frequented and been an inmate of a house of prostitution, and had lived with various men as a mistress. On motion of the plaintiff therein, and against the opposition of the defendant Tousey, he was ordered to serve on plaintiff a bill of particulars specifying the name or names of the individual or individuals whose mistress plaintiff was in the answer alleged to have been, with the date or dates of such alleged facts. In obedience to this order, a bill of particulars, verified

by defendant Tousey, and signed by defendant Spooner, setting forth, among other individuals, that she became the mistress of this plaintiff in this action, in 1880, and was and continued, etc. This action for libel was brought, based on the allegation in the bill of particulars, and the facts above stated were set forth in the complaint. *Held*, that malice could not be presumed from the compliance with the order for a bill of particulars; and that that order was an adjudication in the original action that the defenses there interposed, of which the particulars were ordered, was relevant; and that, consequently, the allegations in the bill of particulars were privileged. *Perzel v. Tousey, 79.*

2. The words "Those people upstairs keep a whore-house," are actionable *per se*. *Cook v. Rief, 302.*
3. Where the complaint alleges that the above words were spoken "concerning" plaintiff, such allegation is sufficient, under the Code, to connect the plaintiff with the words, "the people upstairs," and will admit proof that plaintiff was one of the people referred to. *Id.*

LIEN.

Creditor's bill, when lien of attaches. See Albert v. Back, 550.

MASTER AND SERVANT.

1. In turning over by hand, under orders of defendant's foreman, a portion of a moulding apparatus, used in a foundry, being the cope, the men assigned to that work had lifted it on its edge, and were of sufficient number and strength to hold it, so far as its weight was concerned, in its other movements; a workman, in order to clear it from the crane which was used to lift the cope, but was then out of order, moved the cope with a crow-bar along on its edge some

inches, when, on a further application of the bar, he disturbed its balance, thus suddenly throwing additional weight upon the men who had been safely holding it, causing them to let it fall in consequence of the weight coming so suddenly on them. It fell on the plaintiff, who had been ordered to repair the crane, and who, at the time when the cope fell over, happened to be between the cope and the crane. The plaintiff sustained severe injuries. *Held*, 1st, that the complaint was properly dismissed; 2d, that the case did not require a consideration of a duty to use a certainly safer method than one that is sufficiently safe in itself. *Smith v. Bispham*, 33.

2. An employee discharged without cause is only bound to accept suitable employment similar in kind. Accordingly *held*, that an employment to sell fancy boxes on commission, is not similar in kind to an employment in the business of manufacturing essential oils and essences at a fixed salary. *Fuchs v. Koerner*, 77.
3. The plaintiff was in the hold of one of defendant's steamships, assisting in loading cargo. There were being shipped, under the direction of a foreman, some boards which, when over the hatch became loosened in the chain holding them on the tackle, and fell down the hatch and injured plaintiff, who was directly thereunder. It appearing that safe and suitable machinery had been furnished by the defendant, and that its non-use, or improper use, causing the accident, was owing to the negligence of the plaintiff's fellow servants,—*Held*, that defendant was not liable, and that the motion to dismiss the complaint should have been granted. *Kenny v. Cunard S. S. Co.*, 434.
4. Where all the needed appliances in the work have been furnished by the employer through an appropriate head, he should not be

made liable for mistake or error made by any workman selecting one out of two or more of such appliances, to be used in a service in which all were engaged, and in the use of which one of them should be injured. *Ib.*

5. A master is not responsible to an employee for the negligence of a competent foreman, to whom there has been no delegation of power and control of the business, or a branch thereof, but who is simply charged with special duties. *Ib.*
6. With respect to corporations, who must necessarily act through agents, the rule is subject to modifications; but in all cases it makes no difference in the application of the rule, exempting the master from liability for injuries to his servants, through the acts of co-servants, that the one receiving the injury is inferior in grade, and is subject to the orders of the one by whose negligence the injury is caused, if both are engaged in the same general business, accomplishing one and the same general purpose. *Ib.*

Act of foreman in overloading scaffold, when deemed act of fellow servant—presumption of master's negligence from falling of scaffold unexplained,—master not bound to rebut presumption of negligence when such evidence is supplied by plaintiff, the servant. See Flynn v. Gallagher, 524.

MISTAKE.

Effect of unilateral mistake on contract. See Lister v. Windmuller, 407.

See EQUITY.

MONEY HAD AND RECEIVED.

Complaint for money had and received, when insufficient. See Douglass v. Winslow, 439.

When action for money had and received will not lie. See Rogers v. Schell, 541.

MORTGAGE.

A defense that the mortgage was given to secure advances to be used in the erection of buildings on the mortgaged premises; that the mortgagee failed to make the advances as required by the mortgage, in consequence whereof the mortgagor was compelled personally to advance a large sum to complete the work, and then, to save his credit, to sell the houses erected at a large reduction from their actual value, is not a good objection to the granting a motion made, pursuant to a covenant to that effect in the mortgage, for the appointment of a receiver. *Mackellar v. Rogers*, 360.

Bequest of mortgage, what deemed to be; how enforced. See *Weeks v. Ostrander*, 512.

Agreement with mortgagors of real property to bid in on foreclosure sale and hold for their benefit, the mortgagors to assign their interest in surplus to bidder—subsequent action of mortgagors to recover amount of surplus so assigned by them to purchaser. See *Rogers v. Schell*, 541.

See **USURY.**

MOTIONS AND ORDERS.

Where the notice of motion merely asked "for an order permitting the plaintiff to amend his complaint herein;" and no copy of the proposed amended complaint was served with the motion papers,—*Held*, that for want of such service the motion was properly denied. *Stern v. Knapp*, 14.

Order for publication of summons, when void. See *Hyatt v. Swivel*, 1.
Motion denied on merits cannot be renewed without leave. See *Seaman v. McReynolds*, 543.

MUNICIPAL CORPORATIONS.

1. Negligence is not imputable to a municipal corporation, on account of those defects in its streets which do not arise from their

original construction, or are not caused by it or its duly authorized agents, nor on account of an obstruction placed therein by a wrong-doer, without express or constructive notice thereof. *Hunt v. Mayor*, 198.

2. To constitute constructive notice, the defect or obstruction must be so patent that it can be found out by the corporation by the use of reasonable care and diligence. The law does not presume notice to a municipal corporation, of a latent defect. *Id.*
3. The not placing at the abrupt ending of the street at a high wall a warning as to danger, which would suffice to warn persons of ordinary prudence, was negligence on the part of the corporation. *Nowell v. Mayor*, 382. See **N. Y. CITY; STREETS AND HIGHWAYS.**

NATIONAL BANK.

See **BANKS AND BANKING.**

NEGLIGENCE.

1. There is no contributory negligence when the injured party acts with ordinary prudence, on that apprehension of danger which he is bound to have under the circumstances, and those appearances of danger which the situation manifests. *Nowell v. Mayor*, 382.
2. Thus, when one walking along a street which has the usual conditions of streets with nothing about it to induce apprehension of danger, comes to a wall abruptly ending the street, and falls over the wall, there being no light, or anything else that might be a warning of danger,—*Held*, that the jury might find there was no contributory negligence. *Further held*, that the not placing at the abrupt ending of the street a warning as to danger, which would suffice to warn persons of ordinary prudence, was negligence on the part of the corporation. *Id.*

3. This action was brought by plaintiff for an injury to a horse owned by him, caused by negligent driving of one of defendant's servants. On a review of the evidence,—*Held*, sufficient to carry the case to the jury, and to support a verdict for plaintiff. *Smith v. Consumers' Ice Co.*, 430.
4. After the judge had concluded his charge to the jury, the defendant's counsel requested him to charge further: "If you find from the evidence that the plaintiffs' driver drove his horse close to the wheel of defendant's wagon, upon nice calculations of the chances of injury, then that in itself constitutes such negligence as would prevent the plaintiffs' recovery, and entitle the defendant to a verdict,"—which request was refused. *Held*, not error; that the true question under this head was, did the action of the plaintiff's driver lead or contribute to the injury?—and this without regard to his calculations, or how nice they were; and the subject having been exhausted by the charge previously made, the instruction asked for could have answered no useful purpose. *Ib.*
5. The defendant's counsel also requested the judge to charge as follows: "If you are satisfied from the evidence that the injuries complained of were aggravated by the subsequent negligence of the plaintiff's driver in driving the horse after he was aware of the injury, this fact must be considered in mitigation of plaintiff's damages," which was refused. *Held*, not error. The injury to the horse by the passage of the wheels of the ice cart over its foot was the destruction of the "*os corona*," and was such that it was impossible for the horse to recover; therefore the question suggested by the request was immaterial. The damages recoverable were the value of the horse, with the surgeon and stable bills. *Ib.*
6. An execution against the body can issue against defendant upon a judgment obtained against him, in an action for personal injuries caused by his negligence, though no order of arrest has been obtained. *Ritterman v. Ropes*, 236.
7. The corporation of New York city, under the laws applicable thereto, not being the superior of the employees of the fire department in said city, is not liable for their negligent acts or omissions. *Thompson v. Mayor*, 427.
8. This is so, though the alleged negligent act on which the action is founded occurred while the employees of said department were engaged in testing certain apparatus,—*e. g.*, a fire tower,—prior to its purchase by the city for use in said department. *Ib.*
9. Where the plaintiff, on coming out of the passenger depot where he had bought his ticket, on to the platform, which was joined to and on the same level with the platform to the freight station, which was some distance from the passenger station, and which latter platform (*i. e.*, the one in front of the freight station), appeared to be used in connection with said freight station, saw a train of cars with an engine attached, heading in his direction, standing on the track some distance away,—*Held*, that he had a right to suppose that the train would be brought up to the passenger station, and then stop to take on passengers; and that his awaiting, in the passenger station, for the train to come up and stop, was not negligence contributing to the injury received in the dark by falling over an obstruction, to wit: a box in his way on the freight platform, while proceeding to take the train at the place where it stood, as soon as he was notified by the ticket agent that the train would start from there. *Held further* that his running, while so pro-

ceeding, instead of walking, was not, under the evidence, contributory negligence, as matter of law. *McLennan v. L. I. R. R. Co.*, 22.

10. *Held*, as resulting from above holdings, in an action for injuries so received, that requests to charge (1st) "that it was the duty of the plaintiff to take notice of the time of the departure of the train, and to board it at a reasonable time before departure," and that (2d) "if the plaintiff remained near a light for the purpose of reading a book, and then, at the last moment, attempted to board the train when the time was so short that he could not do so in a prudent and careful manner, he was guilty of negligence," and that (3d) "the company has a right to make up its train and let it stand in front of any part of the station connected with the station as a starting point, and that it was the duty of the passenger to inquire whether it would stop in front of the station or not,"—were properly refused. *Ib.*

11. If the defendant used the freight platform for a passenger platform, so that passengers were obliged to go from the latter to the former, and especially if the defendant's employees invited the plaintiff to go on the line of approach which he took, the court can not say, as matter of law, that the defendant had a right to leave the box in the way of the plaintiff; and, there being evidence on which the jury might have found in both these questions in plaintiff's favor, and the box having been there for some time, it was properly left to the jury to determine whether or not the defendant was guilty of negligence in leaving the box where it was, under the conditions under which it was so left. *Ib.*

Clause in contract exempting common carrier from loss by fire except in

case of fraud or gross negligence; burden of proof. See *Platt v. Richmond, &c. R. R. Co.*, 496.

When negligence as regards condition of highway not imputable to municipal corporation. See *Hunt v. Mayor*, 198.

Negligence in construction of building; all parties concerned therein liable; nuisance. See *Jarvis v. Baxter*, 109.

Examination of plaintiff in negligence case, by physician at the trial, refused. See *Archer v. Sixth Ave. R. R. Co.*, 378.

See MASTER AND SERVANT.

NEW YORK CITY.

1. In an action to recover an award to unknown owners, payment to the chamberlain, pleaded as a defense, does not, in any way, affect the question of costs upon a recovery by plaintiff. Its only effect is to stop interest on the award from the date of such payment. *Bradhurst v. Mayor*, 51.
2. The American Heating and Power Company is not the authorized agent of the city of New York, and the city of New York is not liable for an injury resulting from an explosion caused by the ignition of gas which has accumulated and filled a man-hole in one of its streets, which was constructed and owned by the American Heating and Power Company, there being no evidence that it knew, or ought to have known, that the street was, or was likely to get, out of repair. *Hunt v. Mayor*, 198.
3. The corporation of New York city, under the laws applicable thereto, not being the superior of the employees of the fire department in said city, is not liable for their negligent acts or omissions. *Thompson v. Mayor*, 427.
4. This is so, though the alleged negligent act on which the action is founded occurred while the employees of said department were engaged in testing certain appar-

- atus,—*e. g.*, a fire tower,—prior to its purchase by the city for use in said department. *Ib.*
5. Under § 1042 of the Consolidation Act (L. 1882, ch. 410),—providing that “any teacher may be removed by the Board of Education upon the recommendation of the city superintendent, etc.; but only by a vote of three-fourths of all the members of said board,”—the removal may be without cause asserted or shown, or opportunity to be heard against the removal. *People ex rel. Gorlitz v. Bd. Education*, 520.
6. The power of the mayor of the city of New York to appoint a commissioner of public works and a counsel to the corporation, is an executive power of the state vested in him by the constitution and laws, and involves the exercise of discretion. An *ex parte* injunction restraining him from exercising or controlling him in the exercise of such powers of appointment is therefore void; and his disregard of it is not a contempt (by INGRAHAM, J.). *People ex rel. Roosevelt v. Edson*, 53.
7. Chapter 531, Laws 1891, has no application to such a case, the action of the mayor not being an act on behalf of a county, town, village or municipal corporation (by INGRAHAM, J.). *Ib.*

See MUNICIPAL CORPORATIONS;
STREETS AND HIGHWAYS.

NON-RESIDENT.

See SUMMONS.

NOTICE.

Notice and proof of death under insurance policy. See *Wuesthoff v. Germania Ins. Co.*, 208.

Notice of cancellation of insurance policy, to whom must be given. *Von Wien v. Scottish Ins. Co.*, 490.

Notice to quit. See *Newman v. Marshall*, 202.

Constructive notice to municipal corporation of condition of highway. See *Hunt v. Mayor*, 198.

Notice to produce, what sufficient compliance with. See *Moore v. Leonard*, 8.

NUISANCE.

1. Defendant Fenton was the owner of a lot, on which he caused a building to be erected. He was to furnish the material; defendant Baxter was architect and superintendent, and, as agent of Fenton, bought the materials that were used, and defendant Whalen was the mason and builder. By reason of the inferior quality of the materials used in the building, and the improper and unsafe manner in which it was constructed, a large portion of the west wall fell on plaintiff's house erected on the adjoining lot, and damaged it and the furniture therein. *Held*, that all the defendants were liable for the damage thus caused. *Jarvis v. Baxter*, 109.
2. The fact that one is about to commit an act that would cause a public nuisance, gives the court jurisdiction to restrain it. *Forty-second Street, &c. R. R. Co. v. Thirty-fourth Street R. R. Co.*, 252.
3. In such case,—*i. e.*, public nuisance,—it is sufficient to enable an individual to maintain an action for an injunction, that he has suffered, or will suffer therefrom, substantial damage that is special and peculiar to him, as distinguished from the damage which he has suffered or will suffer, as one of the community. The nature or extent of the damage is immaterial, as the injunction does not depend on them. *Ib.*
4. A street railroad constructed without legal authority, is a public nuisance. *Ib.*

5. A plankway forming a continuous bridge across a sidewalk and totally obstructing it during a greater part of every business day, is a public nuisance. *Callanan v. Gilman*, 112.
6. A private citizen may have an injunction against such a nuisance on showing special damage. *Id.*
7. But slight evidence of special damage will uphold a judgment for an injunction against such a nuisance. *Id.*
8. An injunction will go against a person who creates, maintains and continues a nuisance, in favor of one who is injuriously and specially affected thereby. *Lavery v. Hannigan*, 463.
9. On a review of the evidence in this case,—*Held*, that it appeared therefrom that defendant's use of the sidewalk in front of his store, for display of goods, in connection with an awning structure, and the acts of his employees in such use thereof, deprived the adjoining building (occupied by plaintiffs in business), of light, air and access, to such an extent as showed sufficient special damage to sustain an injunction. *Id.*

OFFICER.

The power of a court of equity to control the acts of an executive officer is limited to such acts and duties as are merely ministerial, and involve no exercise of discretion (by *INGRAHAM, J.*). *People ex rel. Roosevelt v. Edson*, 53.

PARTNERSHIP.

1. An affidavit that the special capital of a limited partnership has been actually and in good faith paid in, and in cash, is false, and no limited partnership is formed, and all the partners are liable as general partners, where it appears that the special partners drew their checks for the amount of the special capital, and

the same were deposited to the credit of the new firm, which thereupon drew and delivered its checks for like amounts in favor of said special partners; it further appearing that these checks were given to pay money due them from a former partnership which the same parties had endeavored to form, but failed, because no affidavit of payment of special capital had ever been made or filed. *Loomis v. Hoyt*, 287.

2. Where the assumed limited partnership carries on the business of commission merchants in New York county, and such is stated to be its business in the certificate there filed, and it is also engaged in the business of tanning leather in another county, no copy of the above certificate being filed in said county, no limited partnership is formed, and the parties are liable as general partners. *Id.*
3. In an action in which it is sought to charge all the parties assuming to form a special partnership as general partners, by reason of their failure to comply with the statutory requirements, the complaint need not be in terms founded on the statute, and an allegation therein of general partnership is sufficient, and admits proof of failure to comply with such requirements, though the answer be a general denial. *Id.*

PAYMENT.

1. A valid settlement of a claim for commissions between the parties for value, is binding on a prior assignee of the claim, where the debtor has not been notified and is ignorant of the assignment at the time of settlement. *Randall v. Reynolds*, 145.
 2. Courts of equity apply the rule as to payment into court according to the equities of each case. *Wood v. Rabe*, 479.
- Award to unknown owners—payment to chamberlain after action com-*

menced, pleaded as defense, effect on costs and interest. See *Bradhurst v. Mayor*, 51.

PERFORMANCE.

See CONTRACTS ; DAMAGES.

PLEADING.

1. A motion to conform pleadings to proof will not be granted when its effect will be to so amend the complaint that it would appear that there was no cause of action. *Richards v. Fox*, 36.
2. *Semble*, that the proposed amendment of the answer being to remedy a supposed defect in the denials, and both parties having, on the trial, treated the denials as sufficient, an amendment is unnecessary, after decision. *Callanan v. Gilman*, 112.
3. The jurisdiction of the superior court is to be presumed. A demurrer is not well taken unless the facts showing want of jurisdiction appear on the face of the complaint. Therefore, a complaint in an action against a foreign corporation, upon contract, which does not show when the contract was made, executed or delivered, nor when nor how the summons was served, is not demurrable for want of jurisdiction, either of the person or the subject matter. *Fisher v. Charter Oak Life Ins. Co.*, 179.
4. A demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action is well taken, if the facts stated do not authorize the judgment prayed for, although they may authorize some other relief. *Ib.*
5. In case of an agreement to apportion and pay the amount apportioned, apportionment is necessary before an action will lie for a money judgment. Therefore, a demurrer to a complaint in an action brought on such an agreement before apportionment, demanding a money judgment, is well taken. But upon proper proof an action will lie to compel the making of an apportionment. *Ib.*
6. The courts of this state will not interfere with the internal administration of the affairs of a foreign corporation, its officers, books and assets not being within their jurisdiction. Therefore, there is no cause of action in this state against such corporation to compel it to perform its agreement to make apportionment of moneys to be received by it. *Ib.*
7. *Query*, whether a complaint alleging facts claimed to constitute such a cause of action against such foreign corporation, and praying for the equitable relief that it make apportionment, is demurrable as showing want of jurisdiction of the subject matter? *Ib.*
8. Where a complaint in an action of ejectment does not set forth that defendant unlawfully withholds, or that he entered without the consent of the plaintiff, or in anywise wrongfully, or that plaintiff is entitled to the immediate possession of the premises, and does not contain any equivalent allegation, it will be held bad on demurrer. It will not be presumed that defendant, in such case, is a wrongdoer. The presumption is that one in possession is lawfully in possession. *Moore v. Lehman*, 283.
9. Except in matters of form, it is still the rule to construe pleadings most strongly against the pleader. *Ib.*
10. Where the complaint sets forth a cause of action arising out of injury to real property,—viz., a lease of certain premises, owned by the two plaintiffs,—caused by the building and operation of an elevated railroad, and the supplemental complaint alleges an assignment to one of the plaintiffs, of all the interest of the other in said claim, and also sets forth a cause of action for personal inju-

- ries in behalf of the plaintiff to whom the assignment is made,—viz., for injuries to his health, &c., arising from the building and operation of said road,—no change being made in the supplemental complaint as to the title of the action or description of the parties, and no leave to discontinue as to the plaintiff making the assignment having been obtained—a demurrer to the whole pleading will be sustained; first, because one of said two causes of action does not affect all the parties; and second, because one of the causes of action falls under subd. 2 of section 484 of the Code of Civil Procedure, and the other under subd. 4, and since they do not arise out of the same transaction, they are improperly united. *Taylor v. Metr. El. Ry. Co.*, 209.
11. That two causes of action which cannot properly be united, are stated in one count, does not deprive defendant of his right to demur for misjoinder. *Ib.*
 12. An owner of stock of a company, from whom the certificate thereof has been taken wrongfully and without his knowledge, and delivered to a third party, cannot unite a cause of action or claim against said third party, with a cause of action on a claim against the company, unless the allegations of the complaint show that the several claims are parts of a single claim or cause of action. *Day v. Bank State of N. Y.*, 363.
 13. Allegations that plaintiff is the owner of certain stock of a company; that the certificate thereof was wrongfully, and without his knowledge, taken from his possession, and delivered to a third party, having on it a power to transfer, the plaintiff's name to which was forged; that said third party refused to return the certificate, and claimed to the company that the certificate had been duly assigned to him, and that he was the lawful holder thereof; and that in consequence the company, although requested, had refused to recognize the plaintiff as the owner of the shares; coupled with a demand for judgment that plaintiff be adjudged to be the owner of the shares, and that the company may be compelled to recognize him as such, to act accordingly, and to account for dividend,—*Held*, on demurrer, to be insufficient, under the above rule. *Ib.*
 14. The words "Those people upstairs keep a whore-house," are actionable *per se*, and where the complaint alleges that the above words were spoken "concerning" plaintiff, such allegation is sufficient under the Code, to connect the plaintiff with the words, "the people up-stairs," and will admit proof that plaintiff was one of the people referred to. *Cook v. Rief*, 302.
 15. The complaint alleged that the railway company, defendant, was debted to plaintiffs in the sum of \$85,000, subsequently reduced by payment to \$75,000; that plaintiffs were persuaded by defendant Winslow, president of the company, to confide negotiations for a settlement thereof to defendant Bard; that Bard informed plaintiffs that the company would only pay \$55,000, advising plaintiffs to accept the same or they would lose the whole claim; that Winslow corroborated Bard's statements and advice, relying upon all which, etc., plaintiffs accepted the offer and gave the company a general release; that said statements of Winslow and Bard were willfully false, and made in pursuance of a conspiracy theretofore formed among defendants to defraud plaintiffs of their balance of \$20,000, and to convert it to the use of defendants; that the company in fact allowed plaintiffs' claim in full, defendants Winslow and Bard concealing such facts from plaintiffs; that

after the release was given, a voucher for said balance of \$2,000, purporting to warrant the payment thereof to plaintiffs, was prepared or caused to be prepared by defendants, was signed, approved and audited by Winslow as president, and by defendant Lathrop as auditor of the company, for their individual purposes and in pursuance of said conspiracy, etc., and its amount was by said company paid or credited to, or divided among these defendants, or some of them, without plaintiffs' knowledge or consent, and in fraud of their rights; that defendants still retain the whole of said \$20,000; that defendant corporation is insolvent, and a judgment against it worthless; and that plaintiffs have suffered damage by reason of said wrongful acts in the sum of \$20,000, for which they pray judgment. *Held*, on separate demurrers by each of the defendants, that the charge of conspiracy must fail for want of an averment in a competent form, that the conspiracy or the acts done in furtherance thereof, resulted in a damage to plaintiffs. *Further held*, that the complaint sets forth neither an action for money had and received for plaintiffs' use, nor one for conversion, nor an action against any particular defendant. *Douglass v. Winslow*, 439.

16. Where the alleged inability arises after the beginning of the action for specific performance, defendant should be allowed to plead the facts tending to show such inability by supplemental answer. *Wilbur v. Gold & Stock Tel. Co.*, 189.

17. In an action in which it is sought to charge all the parties assuming to form a special partnership as general partners, by reason of their failure to comply with the statutory requirements, the complaint need not be in terms founded on the statute, and

an allegation therein of general partnership is sufficient, and admits proof of failure to comply with such requirements, though the answer is a general denial. *Loomis v. Hoyt*, 287.

18. Whether a demurrer to the complaint should be sustained if the facts pleaded do not entitle the plaintiff to the relief demanded, irrespective of his right thereon to other relief, *quære?* *Douglass v. Winslow*, 489.

Complaint by assignee for benefit of creditors in action to enjoin proceedings under execution, and to set aside levy, when held demurrable. See *Chittenden v. Davidson*, 421.

Motion for leave to amend denied for failure to serve copy proposed amended complaint, &c. See *Stern v. Knapp*, 14.

Order denying motion, made after decision filed, for leave to amend answer, when not appealable. See *Callanan v. Gilman*, 112.

When judgment vacated and amendment of answer allowed. See *Born v. Schrenkeisen*, 219.

Cause of action for wrongful detention cannot be sustained under complaint for wrongful detention. See *Hopkins v. Davidson*, 529.

See BILL OF PARTICULARS.

POWERS.

See CORPORATIONS; WIL

PRACTICE.

Order denying motion for leave to amend answer, when not appealable. When such motion should be denied. See *Callanan v. Gilman*, 112.

Body execution, when may issue in action for negligence. See *Ritterman v. Ropes*, 236.

Order denying motion to vacate judgment, when appealable; when such motion should be granted. See *Hlyatt v. Swivel*, 1.

Injunction, when will not go in behalf of assignee for benefit creditors to

- restrain proceedings under execution. See *Chittenden v. Davidson*, 421.
- Right of attachment creditor against debtor's assignee of chose in action. See *Sulzbacher v. Nat'l Shoe, &c. Bank*, 269.
- Bill of particulars, when granted. See *Baremore v. Taylor*, 448.
- Requisites of certificate to official character, &c., of officer taking affidavit outside of state; necessity of certificate. See *Hyatt v. Swivel*, 1.
- Issue raised by demurrer on ground that facts constituting cause of action are not stated. See *Douglas v. Winslow*, 439; *Fisher v. Charter Oak Life Ins. Co.*, 179.
- Causes of action for reformation of contract, and for breach thereof may be joined. *Monne v. Ayer*, 139.
- Court of common pleas not a county court. Injunction, by whom may be granted *ex parte*; violation of void injunction. See *People ex rel. Roosevelt v. Edison*, 53.
- Interpleader, when will not lie. See *Am. Tel. Co. v. Day*, 128; *Sulzbacher v. Nat'l Shoe, &c. B'k.*, 269.
- Payment into court to stop interest. See *Wood v. Rube*, 479.
- Judgment may be vacated and amended, answer served on leave of court obtained, after affirmance of judgment at general term. See *Born v. Schrenkeisen*, 219.
- Receiver under clause in mortgage, when will be appointed. See *Mackellar v. Rogers*, 360.
- Motion for leave to amend complaint denied, for failure to serve copy proposed complaint, etc. See *Stern v. Knapp*, 14.
- Action against city for award to unknown owners, effect on interest and costs of payment to city chamberlain. See *Hunt v. Mayor*, 51.
- Notice to produce, what sufficient compliance with. See *Moore v. Leonard*, 8.
- Certificate in special partnership, must be filed in each county where business is carried on. See *Loomis v. Hoyt*, 287.
- Motion to conform pleading to proof, when not granted. See *Richards v. Fox*, 36.
- Misjoinder of parties and causes of action. See *Taylor v. Metr. El. Ry. Co.*, 299; *Day v. B'k State of N. Y.*, 368.
- Stipulation having force of a contract, not to be set aside. See *Keogh v. Main*, 160.
- Publication of summons, affidavit for, when insufficient. See *Hyatt v. Swivel*, 1.
- Supplementary proceedings, what sufficient as return of execution unsatisfied, to support. Proceeding to give notice of sale of real estate, not satisfaction of execution. See *Forbes v. Spaulding*, 166.
- Trial at special term or by jury; on what depends; practice as to. See *Clark v. Blumenthal*, 355; *Mackellar v. Rogers*, 468; *Willis v. Bellamy*, 373.
- Examination plaintiff in negligence case by physician at the trial not allowed. See *Archer v. Sixth Ave. R. R. Co.*, 378.
- Assignment for benefit of creditors held good as against levy, though not recorded prior thereto. See *Pancoast v. Spowers*, 523.
- Motion denied on merits cannot be renewed without leave. See *Seaman v. McReynolds*, 543.
- Appeal from order sustaining or overruling demurrer will not lie. See *Lovatt v. Watson*, 544.
- Appeal from interlocutory judgment entered on order sustaining demurrer, said order not being appealed from. See *Kaiser v. Independent, &c. Fund, &c.*, 557.
- Divorce, provisions general rule 74 as to examination of plaintiff, when disregarded. See *Burgess v. Burgess*, 545.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND FACTOR.

See FACTOR.

PUBLICATION.

See SUMMONS.

PUBLIC POLICY.

Contracts in restraint of trade. See *Bingham v. Maigne*, 90.

RAILROADS.

1. Where the plaintiff, on coming out of the passenger depot where he had bought his ticket, on to the platform, which was joined to and on the same level with the platform to the freight station, which was some distance from the passenger station, and which latter platform (*i. e.*, the one in front of the freight station) appeared to be used in connection with said freight station, saw a train of cars with an engine attached, heading in his direction, standing on the track some distance away.—*Held*, that he had a right to suppose that the train would be brought up to the passenger station and then stop to take on passengers; and that his awaiting, in the passenger station, for the train to come up and stop, was not negligence contributing injury received in the dark by falling over an obstruction, to wit, a box in his way on the freight platform, while proceeding to take the train at the place where it stood, as soon as he was notified by the ticket agent that the train would start from there. *MacLennan v. L. I. R. R. Co.*, 22.
2. Plaintiff's running, while so proceeding, instead of walking, was not, under the evidence, contributory negligence, as matter of law. *Ib.*
3. As resulting from above holdings, in an action for injuries so received, *held*, that requests to charge (1st) "that it was the duty of the plaintiff to take notice of the time of the departure of the train and to board it at a reasonable time before departure," and that (2d) "if the plaintiff remained near a light for the purpose of reading a book, and then, at the last moment, attempted to board the train when the time was so short that he could not do so in a prudent and careful manner, he was guilty of negligence," and that (3d) "the company has a right to make up its train and let it stand in front of any part of the station connected with the station as a starting point, and that it was the duty of the passenger to inquire whether it would stop in front of the station or not,"—were properly refused. *Ib.*
4. If the defendant used the freight platform for a passenger platform, so that passengers were obliged to go from the latter to the former, and especially if the defendant's employees invited the plaintiff to go on the line of approach which he took, the court cannot say, as matter of law, that the defendant had a right to leave the box in the way of the plaintiff; and there being evidence on which the jury might have found on both these questions in plaintiff's favor, and the box having been there for some time, it was properly left to the jury to determine whether or not the defendant was guilty of negligence in leaving the box where it was under the conditions under which it was so left. *Ib.*
5. The phrase "portion of any street," in Laws of 1884, chapter 252, § 14, includes not merely the space occupied by the tracks, but the space on each side of, and between the tracks (in fact, the whole width of the street), along the whole line of the track. *Forty-second St., &c. R. R. Co. v. Thirty-fourth St. R. R. Co.*, 252.
6. A street surface railroad constructed without legal authority is a public nuisance. *Ib.*
7. Total damage to fee for perma-

- nent injury amounting to the taking of private property may be recovered in an action against an elevated railroad company, upon an offer at the trial to convey the property alleged to have been taken. *Ireland v. Metr. El. Ry. Co.*, 450.
8. Total damage for taking easement attached to real estate, must be limited to the value of easement taken, in ascertaining which the diminution in the value of the property to which such easement is attached, by the taking thereof is to be considered. This value the abutting owner may have determined at a particular time, and the jury may by their verdict either assess the value as of the time of the original taking, and award interest thereon, or give a corresponding gross sum including both principal and interest. But such owner cannot in addition recover for loss of rents, either in the place of interest or otherwise. *Ib.*
9. Damages may be awarded as compensation for injury to easement caused by the noise, smoke, ashes, dust, steam, gas, or cinders, or even the vibration of the building resulting from the operation of an elevated railroad (as well as for those caused by the structure itself and the obstruction of the passage and circulation of light and air occasioned by the running of the trains), upon its appearing that the manner of running, and the physical effects proceeding therefrom, constitute a use of the street in fact other than, or beyond an ordinary and legitimate use thereof, which is a question of fact to be determined in each case upon all the circumstances surrounding it. *Ib.*
10. The doctrine on this question of the cases in this court of Taylor v. Metropolitan Elevated R. R., 50 *Super. Ct.* 311, and Drucker v. Manhattan R. R. Co., 51 *Ib.* 429, approved and followed. The decisions in the Story and Peyser cases in other courts disapproved. *Ib.*
11. *Resumé* of cases as to rights, duties and remedies, decided on questions arising out of the construction and operation of elevated railroads. *Ib.*
12. An owner of property on Pearl street (it being found as matter of fact that Pearl street existed as a public street prior to the conquest of the New Netherlands, and it not appearing that said owner had acquired any interest in the street since that time), has no property or easement in the street, and therefore is not entitled to an injunction against defendants, restraining them from maintaining, continuing or operating the structures of an elevated railroad in that street (which they were authorized to do by the legislature and the city), on the ground of the taking by them of this property without his consent, or compensating him therefor. *Abendroth v. Manh. El. Ry. Co.*, 274.
- Joinder of different causes of action arising out of building and operation of elevated railroad.* See Taylor v. Metr. El. Ry. Co., 299.

See COMMON CARRIERS.

RATIFICATION.

Consequences of an act must be accepted on ratification of the act. See Wuesthoff v. Germania Ins. Co., 208.

REAL PROPERTY.

1. After some negotiation as to the purchase and sale of certain specified real property owned by the plaintiff, the following took place at defendant's store, as testified to by plaintiff: Defendant said he would give for the property \$24,000, and \$500 in furs. Plaintiff said, "It is yours, I will draw you a contract, a receipt,

- and you pay me some money." Defendant said, "Very well, I have not much money in the safe." Plaintiff said, "\$50 will do." Defendant instructed his book-keeper to give plaintiff \$50, and "to draw a receipt." The book-keeper said to plaintiff, "You had better draw the receipt yourself." Plaintiff then drew the receipt. The document drawn constituted a sufficient memorandum of sale under the statute of frauds, was signed by plaintiff, who received the \$50, and left the document with the defendant. It was understood at the interview that plaintiff was to have a formal contract drawn the next day, and defendant was to call at his office and pay \$950 additional. The next day, as also testified to by plaintiff, defendant called at plaintiff's office, and the formal contract (which had been prepared in duplicate), was read over to him, he said "they are apparently all correct, I do not see anything there but what I agree to, . . . but I never sign any papers without my attorney seeing them." I said, 'I want this money to-day.' He said, 'You sign this contract and leave it here with Mr. Knapp, and if my attorney does not come from Brooklyn, I will show it to another attorney, and be here in time for banking hours with the check for \$950.' I then signed the contract, and left it with my check as suggested." Defendant, as a witness on his own behalf, and the only one, gave a materially different version of the two interviews. *Held*, that the complaint was properly dismissed, and that the motion for a new trial which had been made on the minutes, was properly denied. *Wright v. Mischio*, 241.
2. When a party seeks to disaffirm a contract for the purchase of real estate, and to recover the deposit made on account of the price, etc., on the ground of a defective title, he must satisfy the court that the title is bad before he can recover. It is not enough to merely show that it is doubtful. *Methodist Episcopal Church Home v. Thompson*, 321.
 3. Accordingly, where plaintiff, the vendee, refused to take title on the ground that there was an outstanding claim of title, under which certain persons claimed title to the property in question, but the undisputed evidence on the trial showed that defendant, the vendor, and his grantors, had been in actual possession for about thirty years, under a claim of title beginning in 1825, and there was nothing tending to show possession in any other person, or that any third person had a valid claim or lien on the land, — *Held*, that plaintiff could not recover the deposit made by him on account of the purchase price. The facts show a clear adverse possession under the Code for over twenty years, which makes a title that a purchaser may not refuse. *Ib.*
 4. Evidence to the effect that one not executing sealed contract as to real estate is the real party to the contract, is inadmissible in an action based on the contract. *Willis v. Bellamy*, 373.
 5. In an action brought on such a contract, against one who executed it as vendor in his own name, and in his own behalf, and against others (co-defendants), claimed to be the real parties to the contract as vendors, — *Held*, the complaint should be dismissed as to the co-defendants. *Ib.*
 6. Specific performance of a contract to convey a good title will not be decreed at the suit of the vendee, in case the title at the time fixed for the performance of the contract is not sound, although it may be in the power of the vendor to make it good, where the contract is such that the vendor is not, either by its

express terms or implication of law, bound to corroborate or validate the imperfect title. *Ib.*

7. Under a contract which provides that the sum therein required to be deposited by the vendee should be forfeited unless the vendee complies with the contract, provided that the title to the premises sold shall be good, otherwise to be returned to the vendee, "and this contract abandoned without claim of damage for or against either party," the vendor is not bound to corroborate or validate a title imperfect at the time fixed for its performance. *Ib.*

8. In an action brought by a vendee to compel the specific performance of a contract to sell and give a good title to real estate, or in lieu thereof, if that be not practicable, for the recovery of a sum deposited under the contract, and for damages, the court, on its appearing on the trial at special term without a jury, that plaintiff was neither then, nor at the time of the commencement of the action, entitled to specific performance, cannot (a jury trial not being waived), proceed to adjudicate on either the claim for the sum deposited, or the claim for damages. These are strictly legal claims, and the court must at least direct the issues arising thereon to be sent to a jury for trial. *Ib.*

Adjoining owners, rights and duties; house unskillfully and negligently built; owner, architect and builder liable for damage from falling of wall. See *Jarvis v. Baxter*, 109.

Elevated railways, damages by to easement, of abutting owner; how ascertained; liability for. See *Ireland v. Metr. El. R'y Co.*, 450.

Abutting owners have no easement, distinct from public at large, in streets opened prior to the conquest of the New Netherlands, and as such owners have no right to enjoy the authorized maintenance,

etc., of elevated railway, on ground of taking of property without consent. See *Abendroth v. Manh. R'y Co.*, 274.

Power of disposition of real property devised subject to "requests" as to divers matters contained in will. See *Saloman v. Lawrence*, 154.

RECEIPT.

To what extent written receipt of payment, etc., may be explained orally. See *Randall v. Reynolds*, 145.

RECEIVER.

What not sufficient to prevent appointment of receiver under clause in mortgage therefor. See *Macellar v. Rogers*, 360.

REFEREE.

Referee—right of to disregard testimony of both sides on question of quantity, etc., and make independent finding. See *Heim v. Link*, 547.

RELEASE.

To what extent release may be explained orally, and to what claims applicable. See *Randall v. Reynolds*, 145.

REMEDIES.

See EQUITY; INJUNCTION.

RES ADJUDICATA.

1. When a question is not in issue on the pleadings, and would not have been available as a defense if it had been in issue, a judgment in the action against the defendant will not be *res adjudicata* on that question in a subsequent action when it is in issue and is available as a defense. *Metr. Concert Co. v. Abbey*, 97.
2. An action was brought by a corporation lessor against the lessee, for the rent reserved by the lease,

which fell due during the lessee's actual occupancy, and the question of the invalidity of the lease was not in issue on the pleadings, and judgment went against defendant. *Held*, in a subsequent action to recover rent for a period ensuing the lessee's abandoning the occupancy, in which the invalidity of the lease was raised on the pleadings, that the former judgment was not *res adjudicata* on the question of the validity of the lease, since it was not in issue in the first action, and even if it had been pleaded therein, it would not have been available as a defense thereto, whereas in the second action, the invalidity was pleaded, and such invalidity constituted a defense. *Ib.*

3. An adjudication in an action brought by one of two claimants of the same specific legacy to recover the same, is not binding upon the other claimant, he not being a party thereto. *Weeks v. Ostrander*, 512.

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SALE.

- Where a sale is made by sample, the possession of the sample by the seller is constructively sufficient possession of the bulk of goods from which the samples are represented to be drawn to authorize the purchaser, in the absence of any evidence to the contrary, to believe and act on this belief, that the vendee was actually in possession of the bulk; and is sufficient to raise by implication a warranty of title to the bulk in the vendor. Want of actual possession of the bulk is, in such case, as between the vendor and vendee, immaterial. *Lister v. Windmuller*, 407.
- The measure of damages against the vendor for breach of contract of sale of personal property, the vendor in fact having no title to the property sold, but making the sale innocently, is the difference between the contract price and the value at the time of breach. *Ib.*
- The time of breach of contract of sale and delivery *in presenti*, is, as against the vendor, when there is either an absolute refusal to deliver, or a distinct announcement of an inability to deliver. *Ib.*
Written agreement, when conclusive evidence of meeting of minds on subject matter of sale; unilateral mistake, effect of. See *Lister v. Windmuller*, 407.
Sales by factors. See *Casson v. Field*, 196; *Comm. Bk. v. Heilbronner*, 388.

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Auction of chattels—failure of purchaser to remove property by time limited in terms of sale, and consequent loss thereof—when excusable—liability of vendor—implied warranty. See *Gray v. Walton*, 534.

Contract for purchase and sale real property. See **REAL PROPERTY**.

SCHOOLS.

See **N. Y. CITY**.

SLANDER.

See **LIBEL AND SLANDER**.

SPECIAL TERM.

Right to trial at special term.
See **TRIAL**.

SPECIFIC PERFORMANCE.

When specific performance not decreed. See *Wilbur v. Gold & Stock Tel. Co.*, 189.

When specific performance of contract to convey good title to real estate not decreed. See *Willis v. Bellamy*, 373.

STATUTES.

Statutes must be construed in their plain, obvious sense, according to the signification among the people to whom they were directed. *42d St., &c. R. R. Co. v. 34th St. R. R. Co.*, 252.

A statute of South Carolina enacting that no special contract shall "limit or affect the liability at common law of any railroad company within this state, for or in respect of any goods to be carried and conveyed by them," held not to apply to a corporation created and operated only in the state of Virginia, though the bill of lading in question was issued in South

Carolina. See *Platt v. Richmond, &c. R. R. Co.*, 496.

STIPULATIONS.

When a stipulation given in an action has the force of a contract between the parties, it should not be set aside, except upon such clearly disclosed equitable grounds as would authorize the amendment of any contract. *Keogh v. Main*, 160.

STREETS AND HIGHWAYS.

1. A plankway forming a continuous bridge across a sidewalk, and totally obstructing it during a greater part of every business day, is a public nuisance. *Callanan v. Gilman*, 112.
2. A private citizen may have an injunction against such a nuisance on showing special damage, and but slight evidence of special damage will uphold a judgment for an injunction against such a nuisance. *Id.*
3. In such a case, an injunction against obstruction, by any plankway or bridge, or the like, extending across the sidewalk and elevated above it, and against hindering the plaintiffs, their employees and customers, from having free use and passage along the sidewalk in front of defendant's premises, is not too broad. *Id.*
4. The fee of public highways in New York city, established and opened prior to the conquest of the New Netherlands, on such conquest passed to, and vested absolutely in the British crown. By operation of the Dongan charter and the act of the legislature of March 7, 1793, the fee of those of such highways as were within the limits of the city of New York, passed to and vested in the city of New York. The city under the Dongan charter is vested with power to adopt a public road in use within its limits at the time of such con-

quest, and to maintain it as a public street, thereby dedicating it as a public street. Such dedication, however, does not operate as a transfer of the property in the soil, and an abutting owner does not thereby acquire any easement in the street itself as distinct from the public at large, or any property therein, nor can he acquire any title therein by prescription. So far as public rights or interests are concerned, the legislature has supreme control over them, and may regulate the public use, changing one kind into another. *Abendroth v. Manh. Ry. Co.*, 274.

5. Upon these principles, *held*, as to an owner of property on Pearl street (it being found as matter of fact that Pearl street existed as a public street prior to the conquest of the New Netherlands, and it not appearing that said owner had acquired any interest in the street since that time), that he had no property or easement in the street, and therefore was not entitled to an injunction against defendants, restraining them from maintaining, continuing or operating the structures of an elevated railroad in that street (which they were authorized to do by the legislature and the city), on the ground of the taking by them of this property, without his consent, or compensating him therefor. *Ib.*
6. The paramount duty of the city authorities, except as they are otherwise expressly directed, or in cases of necessity otherwise empowered, is to keep the streets of the city, inclusive of the sidewalks, open and unobstructed for the benefit of the people of the entire state; and as a general rule, the public are entitled not only to a free passage along the streets, but to a free passage along each and every portion of every street. *Lavery v. Hannigan*, 463.

7. Under the "Consolidation Act"

of 1883, the power of the common council of New York city to regulate the use of sidewalks is subject to the limitation that the ordinance must not be inconsistent with law, and with the constitution of this state, and also to the further limitation that such common council shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof, during the erection or repair of a building on a lot opposite the same. *Ib.*

8. An injunction will go against a person who creates, maintains and continues a nuisance in favor of one who is injuriously and specially affected thereby. *Ib.*
9. On a review of the evidence in this case, — *Held*, that it appeared therefrom that defendant's use of the sidewalk in front of his store, for display of goods, in connection with an awning structure, and the acts of his employees in such use thereof, deprived the adjoining building (occupied by plaintiffs in their business), of light, air and access, to such an extent as showed sufficient special damage to sustain an injunction. *Ib.*
10. Negligence is not imputable to a municipal corporation, on account of those defects in its streets which do not arise from their original construction, or are not caused by it or its duly authorized agents, nor on account of an obstruction placed therein by a wrong-doer, without express or constructive notice thereof. *Hunt v. Mayor*, 198.
11. To constitute constructive notice, the defect or obstruction must be so patent that it can be found out by the corporation by the use of reasonable care and diligence. The law does not presume notice to a municipal corporation, of a latent defect. *Ib.*

12. The not placing any warning at the abrupt ending of a street at a high wall, is negligence on the part of the city. *Nowell v. Mayor*, 382.

13. Held, that the city of New York was not liable for an injury resulting from an explosion caused by the ignition of gas which had accumulated and filled a man-hole in one of its streets, which was constructed and owned by the American Heating and Power Company, there being no evidence that it knew, or ought to have known that the street was, or was likely to get, out of repair. *Hunt v. Mayor*, 198.

14. The phrase "portion of any street" in Laws of 1884, chapter 252, § 14, includes not merely the space occupied by the tracks, but the space on each side of, and between the tracks (in fact, the whole width of the street), along the whole line of the track. *Forty-second St. R. R. Co. v. Thirty-fourth St. R. R. Co.*, 252.

15. A street surface railroad constructed without legal authority, is a public nuisance. *Ib.*

Elevated railways, for what use of street compensation must be made to abutting owners. See *Ireland v. El. Ry. Co.*, 450.

STOCK.

See **BROKERS ; CORPORATIONS.**

SUBROGATION.

See **EQUITY.**

SUMMONS.

An order for publication of summons, based on an affidavit in which the only fact alleged is, that the defendant against whom the publication is desired is a non-resident, and for that reason personal service within the state cannot be made, is void. *Hyatt v. Swivel*, 1.

Lien of creditor's bill, when attaches on service of summons. See *Albert v. Back*, 550.

SUPPLEMENTAL ANSWER.

See **PLEADING.**

SUPPLEMENTARY PROCEEDINGS.

1. The sheriff, ninety days after an execution was issued to him, made the following return: "In pursuance of the demand of plaintiff's attorney, I make the following return to the within execution: I have collected nothing under, and have not found any personal property out of which the said execution, or any part of the same can be made, but I have thereunder levied upon the real estate mentioned in the annexed notice of sale, and have advertised the same for sale as in said notice provided. I have found no other property out of which to satisfy the same." Held, that the execution was returned unsatisfied within the meaning of section 2435 Code, and that plaintiff was entitled thereunder to an order for defendant's examination in supplementary proceedings. *Forbes v. Spaulding*, 160.

2. The effect of such a return is not modified by the statement of the sheriff, that it was made at request of plaintiff's attorney. *Ib.*

3. The proceeding to give notice of sale of real estate in execution of the statutory power for sale of real estate under a judgment, is not a satisfaction, because the real property remains in the debtor and in his possession. *Ib.*

TAXES AND ASSESSMENTS.

See **N. Y. CITY.**

TELEGRAMS.

When telegram construed as part of contract. See *Bank Montreal v. Recknagle*, 334.

TELEGRAPH COMPANIES.

1. A telegraph company is not a common carrier. *Macpherson v. Western Union Tel. Co.*, 232.
 2. A condition precedent to its duty to transmit a message (there being no contract) is payment of the usual charges. *Ib.*
 3. A complaint against a telegraph company for damages for failure to deliver a message, is insufficient on demurrer, when it neither alleges payment of the usual charges, nor tender thereof, nor any fact showing a waiver thereof, nor any contract between the parties. *Ib.*
- Specific performance of contract to furnish telegraphic information not decreed in case of inability to perform. See Wilbur v. Gold & Stock Tel. Co.*, 189.

TRADE-MARKS.

Held, in this case, that the word "Caporal" having been applied to cigarettes by defendant, before he had ever used plaintiff's process, and as the word "Sweet" prefixed to it was only descriptive of quality, the plaintiff could have no right to the exclusive use of those words, either separately or in conjunction, as a trade-mark applicable to cigarettes; and consequently, as there was no evidence of any agreement, as to the use of the name of "Sweet Caporal," specially on cigarettes treated under the process in question, or that plaintiff or her assignees should have any exclusive right to use such a name as a trade-mark, plaintiff was not entitled to an injunction restraining defendants from using that name as applied to cigarettes. *Hornbostel v. Kinney*, 41.

TRIAL.

1. Where there is a disputed question of fact, and an omission to request submission of it to the jury, the parties are considered as having left it to the decision of

the court, and to have submitted to his decision; and on appeal, his decision must be assumed to be such as will support the verdict. *Casson v. Field*, 196.

2. An omission to take an exception to a charge as to a fact, is an admission, that the fact is as charged. *Ib.*
8. This was an action of trover against brokers, founded on an alleged sale by them against instructions, and a demand and refusal; the defense was two-fold (1st) that the goods were sold by plaintiff's order. This was disputed by the plaintiff, and there was no request to submit the disputed question of facts to the jury; (2d) that the goods were sold for the payment of a general balance due for advances. The court charged there was no general balance due, and this was not excepted to. The jury found for the plaintiff. *Held*, that the judgment entered on the verdict should be affirmed. *Ib.*
4. The test as to the kind of trial to which plaintiff is entitled, is the nature of his demand. If, upon any supposed state of facts set out in the complaint, he claims to have a right to equitable relief, he has a right to a trial at special term. This, though it be perceived that the complaint is clearly insufficient to sustain the demand for equitable relief. *Clark v. Blumenthal*, 355.
5. Where a demand is made for damages, and such demand is secondary to the primary demand for equitable relief, notwithstanding such joinder, the plaintiff is still entitled to have the case tried at special term, at least primarily. *Ib.*
6. Where the right to recover damages, as prayed for, depends on the reformation of a sealed contract, as prayed for, the plaintiff is entitled to a trial at special term, at least primarily. *Ib.*
7. This action was brought to recover damages for an alleged in-

- jury to plaintiff's arm, claimed to have been caused through defendant's negligence; at the close of plaintiff's cross-examination, defendant's counsel asked permission to have a physician, who was in attendance on defendant's behalf, examine the plaintiff's arm; the permission was refused. *Held*, as the court must have understood that the examination asked for was intended to be an investigation independent of the then proceeding taking of testimony, and did not, in its form or substance, indicate otherwise than that the physician would go to the witness on the stand, and make such an examination as a physician would judge to be right and sufficient, involving probably questions to the witness, that there was no error in the refusal. *Archer v. Sixth Ave. R. R. Co.*, 378.
8. Where a counter-claim, founded on a cause of action at law, is interposed to a complaint in an action for equitable relief, triable by the court without a jury, if a jury trial of the issues arising on such counter-claim is desired by either party, he must, within ten days after issue joined on the counter-claim, give notice under Rule 31, of a special motion to be made on the pleadings, that the whole issue, or any specific questions of fact involved therein, be tried by a jury. If he omits to do this, he waives a jury trial, and cannot, on the trial at special term before the court, claim a jury trial of the issues on the counter-claim, as matter of right. *Mackellar v. Rogers*, 468.
 9. In such case, it is discretionary with the court to grant a postponement of the trial for the sole purpose of enabling said party to make such special motion. *Ib.*
 10. Sections 970 and 974 Code, construed. *Ib.*
 11. Error in exclusion of evidence is cured by the subsequent admission of evidence on the same point offered by the party against whom the error was committed. *Lister v. Windmuller*, 407.
 12. In an action brought by a vendee to compel the specific performance of a contract to sell and give a good title to real estate, or in lieu thereof, if that be not practicable, for the recovery of a sum deposited under the contract, and for damages, the court, on its appearing the trial at special term without a jury, that plaintiff was neither then, nor at the time of the commencement of the action, entitled to specific performance, cannot (a jury trial not being waived), proceed to adjudicate on either the claim for the sum deposited, or the claim for damages. These are strictly legal claims, and the court must at least direct the issues arising thereon to be sent to a jury for trial. *Willis v. Bellamy*, 378.
- Right of referees to disregard testimony of both sides as to quantity, etc.* See *Heim v. Link*, 547.
- See JUDGE'S CHARGE.
- TRUSTS.
- See WILL.
- ULTRA VIRES.
- See CORPORATIONS.
- U. S. LAW.
- See BANKS AND BANKING.
- USURY.
- In an action to foreclose two mortgages, the defense was usury. Plaintiffs relied on two certificates as to the validity of the mortgages, and as to there being no defense to them. Defendants called a witness, who testified to hearing a conversation between one of the defendants and the plaintiffs' testator (the mortgagee), tending to establish the usury relied on, and also called two others, who testified to admissions by the mortgagee, tend-

PUBLICATION.

See SUMMONS.

PUBLIC POLICY.

Contracts in restraint of trade. See *Bingham v. Maigne*, 90.

RAILROADS.

1. Where the plaintiff, on coming out of the passenger depot where he had bought his ticket, on to the platform, which was joined to and on the same level with the platform to the freight station, which was some distance from the passenger station, and which latter platform (*i. e.*, the one in front of the freight station) appeared to be used in connection with said freight station, saw a train of cars with an engine attached, heading in his direction, standing on the track some distance away.—*Held*, that he had a right to suppose that the train would be brought up to the passenger station and then stop to take on passengers; and that his awaiting, in the passenger station, for the train to come up and stop, was not negligence contributing injury received in the dark by falling over an obstruction, to wit, a box in his way on the freight platform, while proceeding to take the train at the place where it stood, as soon as he was notified by the ticket agent that the train would start from there. *MacLennan v. L. I. R. R. Co.*, 22.
2. Plaintiff's running, while so proceeding, instead of walking, was not, under the evidence, contributory negligence, as matter of law. *Ib.*
3. As resulting from above holdings, in an action for injuries so received, *held*, that requests to charge (1st) "that it was the duty of the plaintiff to take notice of the time of the departure of the train and to board it at a reasonable time before depart-

ure," and that (2d) "if the plaintiff remained near a light for the purpose of reading a book, and then, at the last moment, attempted to board the train when the time was so short that he could not do so in a prudent and careful manner, he was guilty of negligence," and that (3d) "the company has a right to make up its train and let it stand in front of any part of the station connected with the station as a starting point, and that it was the duty of the passenger to inquire whether it would stop in front of the station or not,"—were properly refused. *Ib.*

4. If the defendant used the freight platform for a passenger platform, so that passengers were obliged to go from the latter to the former, and especially if the defendant's employees invited the plaintiff to go on the line of approach which he took, the court cannot say, as matter of law, that the defendant had a right to leave the box in the way of the plaintiff; and there being evidence on which the jury might have found on both these questions in plaintiff's favor, and the box having been there for some time, it was properly left to the jury to determine whether or not the defendant was guilty of negligence in leaving the box where it was under the conditions under which it was so left. *Ib.*
5. The phrase "portion of any street," in Laws of 1884, chapter 252, § 14, includes not merely the space occupied by the tracks, but the space on each side of, and between the tracks (in fact, the whole width of the street), along the whole line of the track. *Forty-second St., &c. R. R. Co. v. Thirty-fourth St. R. R. Co.*, 252.
6. A street surface railroad constructed without legal authority is a public nuisance. *Ib.*
7. Total damage to fee for perma-

- nent injury amounting to the taking of private property may be recovered in an action against an elevated railroad company, upon an offer at the trial to convey the property alleged to have been taken. *Ireland v. Metr. El. Ry. Co.*, 450.
8. Total damage for taking easement attached to real estate, must be limited to the value of easement taken, in ascertaining which the diminution in the value of the property to which such easement is attached, by the taking thereof is to be considered. This value the abutting owner may have determined at a particular time, and the jury may by their verdict either assess the value as of the time of the original taking, and award interest thereon, or give a corresponding gross sum including both principal and interest. But such owner cannot in addition recover for loss of rents, either in the place of interest or otherwise. *Ib.*
9. Damages may be awarded as compensation for injury to easement caused by the noise, smoke, ashes, dust, steam, gas, or cinders, or even the vibration of the building resulting from the operation of an elevated railroad (as well as for those caused by the structure itself and the obstruction of the passage and circulation of light and air occasioned by the running of the trains), upon its appearing that the manner of running, and the physical effects proceeding therefrom, constitute a use of the street in fact other than, or beyond an ordinary and legitimate use thereof, which is a question of fact to be determined in each case upon all the circumstances surrounding it. *Ib.*
10. The doctrine on this question of the cases in this court of *Taylor v. Metropolitan Elevated R. R.*, 50 *Super. Ct.* 311, and *Drucker v. Manhattan R. R. Co.*, 51 *Ib.* 429, approved and followed. The decisions in the *Story* and *Peyser* cases in other courts disapproved. *Ib.*
11. *Resumé* of cases as to rights, duties and remedies, decided on questions arising out of the construction and operation of elevated railroads. *Ib.*
12. An owner of property on Pearl street (it being found as matter of fact that Pearl street existed as a public street prior to the conquest of the New Netherlands, and it not appearing that said owner had acquired any interest in the street since that time), has no property or easement in the street, and therefore is not entitled to an injunction against defendants, restraining them from maintaining, continuing or operating the structures of an elevated railroad in that street (which they were authorized to do by the legislature and the city), on the ground of the taking by them of this property without his consent, or compensating him therefor. *Abendroth v. Manh. El. Ry. Co.*, 274.
- Joinder of different causes of action arising out of building and operation of elevated railroad.* See *Taylor v. Metr. El. Ry. Co.*, 299.

See COMMON CARRIERS.

RATIFICATION.

Consequences of an act must be accepted on ratification of the act. See *Wuesthoff v. Germania Ins. Co.*, 208.

REAL PROPERTY.

1. After some negotiation as to the purchase and sale of certain specified real property owned by the plaintiff, the following took place at defendant's store, as testified to by plaintiff: Defendant said he would give for the property \$24,000, and \$500 in furs. Plaintiff said, "It is yours, I will draw you a contract, a receipt,

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